CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALBERT TOWNSEND,	:
Petitioner,	:
-vs-	:
JERRY SPATNY, WARDEN	:
Respondent.	:

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

FOR PETITIONER:

Albert Townsend, #: A580-463
Grafton Corr. Inst.
2500 S. Avon-Belden Rd.
Grafton, Ohio 44044
Petitioner, in pro se

FOR APPELLEE:

Stephanie L. Watson (36411.)
Assistant Ohio Attorney General
30 E. Broad St.
Columbus, Ohio 43215
614-644-7233
855-665-2568 (FAX)

Statutory Counsel for Respondent

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No. 24-3536

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EXHIBIT (B)
APPENDIX

ALBERT J. TOWNSEND,

Petitioner-Appellant,

v.

KEITH J. FOLEY, Warden,

Respondent-Appellee.

ORDER

Before: DAVIS, Circuit Judge.

Albert J. Townsend, a pro se Ohio prisoner, appeals a district court order denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Townsend moves for a certificate of appealability (COA) and for leave to proceed in forma pauperis (IFP). As discussed below, the court denies a COA and denies the IFP motion as moot.

In 2018, after a six-day trial at which Townsend represented himself, a jury found him guilty of multiple counts of rape, kidnapping, complicity to commit rape, attempted rape, and gross sexual imposition; some convictions included a sexually-violent-predator specification, a sexual-motivation specification, or a firearm specification. The trial court sentenced Townsend to a total term of 56 years to life imprisonment. The Ohio Court of Appeals vacated the sexually-violent-predator specifications for the corresponding convictions and remanded the case to the trial court for resentencing as to those convictions. *State v. Townsend*, No. 107186, 2019 WL 1417862, at *10 (Ohio Ct. App. Mar. 28, 2019). It otherwise affirmed. *Id.* The Ohio Supreme Court affirmed and remanded the case for resentencing. *State v. Townsend*, 167 N.E.3d 954 (Ohio 2020) (table). On remand, the trial court again sentenced Townsend to 56 years to life imprisonment. The Ohio Court of Appeals affirmed, *State v. Townsend*, No. 110525, 2022 WL 712515 (Ohio Ct. App. Mar. 10, 2022), and the Ohio Supreme Court declined jurisdiction, *State v. Townsend*, 189 N.E.3d 824 (Ohio 2022) (table).

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Albert J. Townsend
#580463
Grafton Correctional Institution
2500 S. Avon Belden Road
Grafton, OH 44044

Meanwhile, Townsend had filed a petition for post-conviction relief along with other motions; the trial court denied at least some of the motions. The Ohio Court of Appeals dismissed Townsend's appeal for lack of jurisdiction on the ground that the trial court did not issue findings of fact or conclusions of law and thus did not issue a final order. The Ohio Supreme Court dismissed Townsend's appeal for failure to prosecute.

In the meantime, Townsend had filed an application for reopening his direct appeal under Ohio Rule of Criminal Procedure 26(B). The Ohio Court of Appeals denied the application, and the Ohio Supreme Court declined jurisdiction. Thereafter, Townsend unsuccessfully pursued additional post-conviction relief in the state courts.

Townsend's amended habeas petition claims that (1) his speedy trial rights were violated, (2) the prosecution violated his due process rights by suppressing exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), (3) his rights under the Confrontation Clause were violated, (4) the trial court violated his due process rights through its judicial bias and abuse of discretion, (5) the trial court violated his right to compulsory process, and (6) the trial court denied him the right to the effective assistance of counsel when it declined to appoint a specific attorney whom he requested as standby counsel after he elected to represent himself.

A magistrate judge issued a report and recommendation (R & R) that Townsend's petition be denied because his claims were procedurally defaulted, reasonably adjudicated on the merits by the state courts, meritless, or not cognizable on federal habeas review. The magistrate judge informed Townsend that he could forfeit appellate review if he failed to file objections to the R & R within 14 days. Within that 14-day period, Townsend moved for an extension of at least 30 days to file objections to the R & R. The district court granted a 30-day extension and ordered Townsend to file objections on or before May 3, 2024. Before May 13, 2014, no objections from Townsend had been docketed. So, that day, the district court adopted the R & R, denied Townsend's petition, and declined to issue a COA.

That same day, the clerk docketed Townsend's objections. Shortly thereafter, the clerk docketed an affidavit, motion for reconsideration, and motion for relief from judgment from Townsend. In them, Townsend argued that he placed his objections in the prison mailbox on May

3, 2024—rendering them timely—and that the district court must therefore consider them even though the prison mailroom staff did not mail his objections until a few days later. The district court denied the motions. Although the district court found that Townsend had supported his argument that his objections were timely, it deemed the objections meritless and overruled them.

A COA may be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 327, 336 (2003). Under the Antiterrorism and Effective Death Penalty Act (AEDPA), when a state court adjudicates the petitioner's claims on the merits, the district court may not grant habeas relief unless the state court's adjudication resulted in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Harrington v. Richter*, 562 U.S. 86, 100 (2011). When AEDPA deference applies, a reviewing court, in the COA context, must evaluate the district court's application of § 2254(d) and determine "whether that resolution was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336. When the district court's denial is based on a procedural ruling, the movant must demonstrate that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

As an initial matter, this court lacks jurisdiction to review the district court's denial of Townsend's motions for reconsideration and relief from judgment because he failed to file a notice of appeal from that decision. Federal Rule of Appellate Procedure 3 requires a notice of appeal to "designate the judgment—or the appealable order—from which the appeal is taken" and Townsend's notice of appeal, which was filed before the district court denied his motions for reconsideration and relief from judgment, obviously did not designate that later-entered order. Fed. R. App. P. 3(c)(1)(B). If Townsend intended to appeal the district court's denial of his post-judgment motions, he was required to "file a notice of appeal, or an amended notice of appeal," following the entry of that order. Fed. R. App. P. (4)(a)(4)(B)(ii). Because Townsend did not do

so, this court's review is limited to the district court's order denying his habeas petition based on the R & R to which Townsend (at that time) had failed to object. *See Gruener v. Ohio Cas. Ins.*, 510 F.3d 661, 665-66 (6th Cir. 2008) (declining to entertain an appeal from the denial of a motion for new trial because the appellant failed to amend her notice of appeal to include the denial); *Rogers v. City of Warren*, 302 F. App'x 371, 376 (6th Cir. 2008) ("Under [Rule] 4(a)(4)(B)(ii), a party must amend its notice of appeal to include an order denying a motion for reconsideration if the party intends to rely on that post-judgment motion as a basis for its appeal.").

Generally, a petitioner who fails to object to a magistrate judge's report forfeits further review of his claims, provided that he was advised of the consequences for not doing so. *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995); *see Thomas v. Arn*, 474 U.S. 140, 155 (1985). This rule is nonjurisdictional, however, and may be excused "in the interests of justice." *Arn*, 474 U.S. at 155. Here, the R & R included the requisite notice, and Townsend did not initially appear to file timely objections despite being granted an extension of time. However, the district court later noted that Townsend presented evidence that he deposited his objections in the prison mail before expiration of the extended deadline to file them, and the court therefore considered his objections. This court, too, will excuse the forfeiture and review Townsend's claims. *See Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 458 (6th Cir. 2012).

Ground One, Two, Three, and Six

The district court determined that grounds one, two, three, and six were procedurally defaulted. Townsend did not raise any of these claims on direct appeal to the Ohio Court of Appeals. Instead, he raised them in state court for the first time (if at all) as follows:

Grounds One and Two—Speedy Trial and Due Process: Townsend first raised these two claims in his petition for post-conviction relief, and, after the trial court and state appellate court denied relief, the Ohio Supreme Court explicitly dismissed Townsend's case for failure to prosecute because he did not timely file a jurisdictional memorandum, which is required under Ohio Supreme Court Rule of Practice 7.02(A). Townsend therefore did not "fairly present" these claims to the Ohio courts on initial collateral review. *Stanford v. Parker*, 266 F.3d 442, 451 (6th Cir. 2001); *see Bonilla v. Hurley*, 370 F.3d 494, 497 (6th Cir. 2004) (per curiam). Townsend did

argue the merits of these claims in the context of ineffective-assistance-of-appellate-counsel claims that he raised in his Rule 26(B) application. *See* Ohio App.R. 26(B)(1); Ohio S.Ct.Prac.R. 11.6. But those arguments did not preserve the underlying substantive claims that his speedy-trial and due process rights were violated. *See Lott v. Coyle*, 261 F.3d 594, 611 (6th Cir. 2001).

Ground Three—Confrontation Clause: Although Townsend raised his third claim in his memorandum in support of jurisdiction in the Ohio Supreme Court, he did not raise the claim on direct appeal to the Ohio Court of Appeals. He therefore failed to invoke one complete round of Ohio's appellate review process. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

Ground Six—Ineffective Assistance of Counsel: Townsend never raised this claim in the state courts. His arguments on direct appeal that were related to representation were limited to whether he knowingly, voluntarily, and intelligently waived his right to counsel. *See Townsend*, 2019 WL 1417862, at *3-5. The district court aptly determined that "those claims are unrelated to whether the trial court violated Townsend's Constitutional rights by not appointing [a specific attorney] as [standby] counsel."

When analyzing whether a habeas petitioner procedurally defaulted a federal claim in state court, a federal court must consider whether "(1) the petitioner failed to comply with a state procedural rule; (2) the state courts enforced the rule; (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim; and (4) the petitioner has not shown cause and prejudice excusing the default." *Jalowiec v. Bradshaw*, 657 F.3d 293, 302 (6th Cir. 2011) (citing *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010)). "In determining whether a state procedural rule was applied to bar a claim, a reviewing court looks to the last reasoned state-court decision disposing of the claim." *Id.* (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991), and *Guilmette*, 624 F.3d at 291). Here, for grounds one and two, although this court has not considered whether dismissing an appeal for failure to comply with Ohio Supreme Court Rule of Practice 7.02(A) is an adequate and independent state procedural rule, several district court decisions have held it to be so. *See, e.g.*, *Jones v. Yost*, No. 3:22-cv-352, 2024 WL 579748, at *5 (S.D. Ohio Feb. 13, 2024) (collecting cases). As for grounds three and six, res judicata now prohibits the Ohio courts from considering these claims. *See Williams v.*

Bagley, 380 F.3d 932, 967 (6th Cir. 2004); *see Eley v. Bagley*, 604 F.3d 958, 965 (6th Cir. 2010) (recognizing Ohio's res judicata rule as a procedural rule that serves as an adequate and independent state ground for denying review of a federal constitutional claim). Accordingly, reasonable jurists would agree that grounds one through three and six are procedurally defaulted.

A federal habeas court is barred from reviewing a procedurally defaulted claim unless the petitioner can show either cause for the default and actual prejudice from the alleged constitutional violation, or that failure to consider the claim would result in a "fundamental miscarriage of justice," *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991), *abrogated on other grounds by Martinez v. Ryan*, 566 U.S. 1, 9 (2012), which can be demonstrated only by presenting new evidence showing one's actual innocence, *Hodges v. Colson*, 727 F.3d 517, 530 (6th Cir. 2013). In his objections, Townsend argued that ineffective assistance of appellate counsel excused the default of his Confrontation Clause claim only. Appellate counsel's failure to raise an issue on appeal can serve as cause to excuse a procedural default if the error rises to the level of ineffective assistance of counsel. *See Murray v. Carrier*, 477 U.S. 478, 488-89 (1986). To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Appellate counsel is not required "to raise every non-frivolous issue on appeal." *Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003). Indeed, "'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). Where, as here, appellate counsel "presents one argument on appeal rather than another . . . the petitioner must demonstrate that the issue not presented 'was clearly stronger than issues that counsel did present'" to establish ineffective assistance of counsel. *Caver*, 349 F.3d at 348 (quoting *Smith v. Robbins*, 528 U.S. 259, 289 (2000)).

Townsend has not demonstrated that his Confrontation Clause claim was "clearly stronger" than the claims appellate counsel chose to pursue. The claim challenged the testimony of an examining nurse, who relayed information regarding one of the victims, B.G., including statements that B.G. allegedly made to the nurse. The district court determined that the Ohio Court of

Appeals, in denying Townsend's Rule 26(B) application, reasonably concluded that admission of B.G.'s statements to the nurse did not violate the Confrontation Clause because they were nontestimonial in nature. No reasonable jurist could disagree: The Confrontation Clause generally prohibits admission only of out-of-court *testimonial* statements by a non-testifying witness unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 54 (2004). Statements made to medical professionals during treatment are nontestimonial and thus do not implicate the Confrontation Clause. *See Giles v. California*, 554 U.S. 353, 376 (2008) (noting in dicta that "statements to physicians in the course of receiving treatment" would not be subject to exclusion under the Confrontation Clause); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 n.2 (2009) (stating in dicta that "medical reports created for treatment purposes . . . would not be testimonial"); *see also Dorsey v. Cook*, 677 F. App'x 265, 266-67 (6th Cir. 2017) (per curiam). Reasonable jurists therefore would agree that Townsend's Confrontation Clause claim lacked sufficient merit to make the failure to raise it on direct appeal unreasonable.

Townsend therefore cannot rely upon ineffective assistance of his appellate counsel to excuse the default of his Confrontation Clause claim. And he did not argue that it excuses the default of any of his other claims. Nor does he argue that his actual innocence excuses the default of any of his claims. No reasonable jurist therefore could debate the district court's rejection of grounds one, two, three, and six as procedurally defaulted.[1]

Ground Four—Judicial Bias and Abuse of Discretion

Townsend claims that he was denied due process through the trial court's judicial bias and abuse of discretion. When Townsend raised this claim on direct appeal, he argued that the trial court "abruptly cut [him] off" during voir dire, "continuously sustained objections before the

[1] Because reasonable jurists could not debate the district court's denial of these claims on the ground that they were procedurally defaulted, this court need not consider its alternative conclusion that ground one is not cognizable on federal habeas review and that grounds two, four, and six are meritless.

prosecutor even objected," admonished him for making objections that the trial court claimed were "frivolous," and "berated" him in front of the jury.

"Judicial misconduct is found where the judge's remarks clearly indicate a hostility to one of the parties, or an unwarranted prejudgment of the merits of the case, or an alignment on the part of the Court with one of the parties." *United States v. Ross*, 703 F.3d 856, 878 (6th Cir. 2012) (quoting *United States v. Blood*, 435 F.3d 612, 629 (6th Cir. 2006)). "To show constitutionally improper prejudice, a judge's comments must 'display a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Bailey v. Smith*, 492 F. App'x 619, 630-31 (6th Cir. 2012) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)); *see Coley v. Bagley*, 706 F.3d 741, 750 (6th Cir. 2013).

Upon review of the record, the Ohio Court of Appeals found that "the questions the trial court did not allow or sua sponte sustained objections to were either inadmissible or inappropriate questions Townsend posed to witnesses." *Townsend*, 2019 WL 1417862, at *5. The Ohio Court of Appeals added that the trial court "repeatedly warned Townsend that he could not make statements in front of the jury while questioning witnesses and repeatedly assisted Townsend in rephrasing questions or offered suggestions to assist him with presenting his case." *Id.*

The district court agreed with these findings and the state appellate court's conclusion that Townsend failed to show judicial bias. No reasonable jurist could disagree. Although Townsend maintains that the trial court's bias is evidenced by its referring to Townsend as "Hitler" and making a "Heil Hitler" gesture, the argument finds no support in the record. The trial court—outside the presence of the jury—merely told Townsend that it would "give [him] a fair trial" even if he were a "historical character," such as "a Hitler, a Stalin, whatever," and that it did not "have to inject [its] personality into this case" because "the jury will get it right" and the appellate court "will see that [the court] has bent over backwards to provide a fair trial to [him]." Townsend has not shown that these or any other statements "reveal[ed] such a high degree of favoritism or antagonism [so] as to make fair judgment impossible." *Liteky*, 510 U.S. at 555. A COA therefore is denied on ground four.

Ground Five—Compulsory Process

Townsend claims that the trial court violated his Sixth Amendment right to compulsory process by denying his request for a continuance upon learning that a defense witness was not in attendance at trial.

The Sixth Amendment guarantees a criminal defendant the right "to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. But the right to compulsory process is not absolute; "more than the mere absence of testimony is necessary to establish a violation of the right," and a defendant "must at least make some plausible showing of how [the witness's] testimony would have been both material and favorable to his defense." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982); *see United States v. Culp*, 828 F. App'x 298, 300 (6th Cir. 2020) (per curiam).

In rejecting this claim, the Ohio Court of Appeals reasoned that Townsend failed to show that he served any defense witnesses with a subpoena and failed to proffer any favorable testimony that the missing witnesses would have provided on his behalf. *Townsend*, 2019 WL 1417862, at *6. The district court found this decision reasonable, emphasizing that Townsend cannot establish a compulsory-process violation without evidence that the missing witness was properly served with a subpoena and without a description of the missing witness's purportedly favorable testimony. Although, in his motion for a COA, Townsend attempts to describe certain witnesses' testimony that "could likely [have] produced a different outcome," he failed to convey this information to the state courts. Reasonable jurists therefore could not debate the district court's conclusion that the Ohio Court of Appeals' rejection of Townsend's compulsory-process claim was not contrary to or an unreasonable application of clearly established federal law or based on an unreasonable determination of the facts.

New Claims in COA Motion

In one of his motions for a COA, Townsend claims that his appellate attorney was ineffective in various respects. The court declines to consider these claims because they were not raised in Townsend's original or amended petition and instead were raised for the first time on

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-3536

ALBERT J. TOWNSEND,

Petitioner-Appellant,

v.

KEITH J. FOLEY, Warden,

Respondent-Appellee.

Before: DAVIS, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Albert J. Townsend for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is DENIED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

appeal. *See, e.g.*, *Seymour v. Walker*, 224 F.3d 542, 561 (6th Cir. 2000); *Chandler v. Jones*, 813 F.2d 773, 777 (6th Cir. 1987).

The court therefore **DENIES** the motion for a COA and **DENIES** as moot the motion for leave to proceed IFP.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

APPE
EXHIBIT (C)
A1

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALBERT TOWNSEND,	)	CASE NO. 1:21-CV-01
	)	
Petitioner,	)	JUDGE BENITA Y. PEARSON
	)	
v.	)	MAGISTRATE JUDGE
	)	THOMAS M. PARKER
KEITH FOLEY, WARDEN,	)	
	)	
Respondent.	)	**REPORT AND RECOMMENDATION**
	)	

Petitioner, Albert Townsend, an Ohio prisoner now serving an aggregate sentence of 56 years to life imprisonment after having been convicted of multiple counts of rape, kidnapping, and other offenses, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. ECF Docs. 1, 59 (original and amended petitions for writ of habeas corpus). Townsend asserts six grounds for relief:

> **Ground One**: Petitioner's speedy trial rights were violated. *See* ECF Doc. 59 at PageID # 787-89.
>
> **Ground Two**: Petitioner's due process rights were violated when the prosecution committed a *Brady*[1] violation by suppressing evidence. *See id.* at PageID # 789-96.
>
> **Ground Three**: Petitioner's Sixth Amendment right to confront his accuser was violated when an alleged victim (B.G.) failed to appear at trial and the court allowed an examining nurse (Nurse Schreiber) to provide out-of-court statements made by that victim. *See id.* at PageID # 796-99.
>
> **Ground Four**: Petitioner's due process rights were violated because of judicial bias and abuse of discretion. *See id.* at PageID # 799-801.

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

Ground Five: Petitioner's Sixth Amendment right to compulsory process was violated when the trial court refused to grant a continuance for a defense witness. *See id.* at PageID # 801-03.

Ground Six: Petitioner's Sixth Amendment right to effective assistance of counsel was violated when the trial court did not appoint a specific requested attorney (Nancy Glick) as defense counsel. *See id.* at PageID # 803-05.

Respondent, Warden Keith Foley, filed a return of writ. ECF Doc. 70. Townsend never filed a traverse. While the petition was pending, Townsend filed a motion for leave to request discovery pursuant to "Rule 6." ECF Doc. 72.

Because Townsend's claims are either procedurally defaulted, noncognizable, or lack merit, I recommend that they be DISMISSED or DENIED as set forth below, and that Townsend's petition for writ of habeas corpus be DENIED. I further recommend that Townsend not be granted a certificate of appealability.

I. State Court History

A. Trial Court

On February 22, 2017, a Cuyahoga County grand jury issued an indictment charging Townsend with: (i) six counts of rape, in violation of Ohio Rev. Code § 2907.02(A)(2) (Counts 1, 2, 9, 10, 13, and 14); (ii) one count of complicity to rape, in violation of Ohio Rev. Code § 2923.03(A)(2) (Count 3); (iii) three counts of kidnapping, in violation of Ohio Rev. Code § 2905.01(A)(4) (Count 7, 12, and 16); (iv) one count of aggravated burglary, in violation of Ohio Rev. Code § 2911.11(A)(2) (Count 8); (v) one count of attempted rape, in violation of Ohio Rev. Code §§ 2907.02(A)(2) and 2923.02 (Count 11); and (vi) one count of gross sexual imposition, in violation of Ohio Rev. Code § 2907.05(A)(1) (Count 15).[2] ECF Doc. 70-1 at PageID # 1038-48. All counts, but Count 8, carried a sexually violent predator specification;

[2] Counts 4 and 5 were charged solely against Townsend's codefendant, Kris Williams, ECF Doc. 70-1 at PageID # 1040, and Count 7 was charged against both Townsend and Williams, *id.* at PageID # 1041.

Counts 7, 12 and 16 carried a sexual motivation specification; and Counts 8, 9, 10, 11 and 12 each carried 1- and 3-year firearm specifications. *Id.* On March 2, 2017, the court appointed Mr. Hildebrand as defense counsel and Townsend pleaded not guilty.[3] *Id.* at PageID # 1051.

Although represented by counsel at the time, Townsend filed a number of *pro se* motions between March 10 and October 31, 2017. *Id.* at PageID # 1052-105. In relevant part, Townsend filed: (i) a notice denying consent to any continuances and requesting the setting of an immediate trial date ("Speedy Trial Motion"), *id.* at PageID # 1055; (ii) a motion to dismiss for preindictment delay, *id.* at PageID # 1058-73; (iii) a motion to dismiss his attorney and represent himself *pro se*, *id.* at PageID # 1075-76; and (iv) a motion to dismiss a defective indictment pursuant to "Rule 49(a)(2)(A)" ("Rule 49(a)(2)(A) Motion"), *id* at PageID # 1077-80.

After Townsend indicated that he wished to represent himself moving forward, the court held a hearing on October 30, 2017, at which Townsend signed a waiver of right to counsel and an expression of intent to proceed *pro se* pursuant to Ohio Crim. R. 44. *Id.* at Page ID # 1106-113; ECF Doc. 71-1 at PageID # 2363-91. The court notified Townsend that Mr. Smotzer would serve as his standby counsel going forward. *Id.* at PageID # 2371, 2376, 2386, 2392. Townsend objected to having Mr. Smotzer as standby counsel, *id.* at PageID # 2382, 2386, and asked the court to appoint either Nancy Glick or Sara Cofta as standby counsel, *id.* at PageID # 2387. The court denied the request, noting that: (i) the court could not appoint a counsel who had never responded to Townsend in an affirmative manner;[4] (ii) Townsend required a criminal trial specialist; and (iii) if Townsend's wife could recoup a retainer for a previous lawyer who quit, he could retain the counsel of his choosing. *Id.* at PageID # 2387-88.

[3] At a later date, it appears that Mr. Hildebrand withdrew, and Mr. Smotzer was appointed as replacement defense counsel. *See* ECF Doc. 70-1 at PageID # 1134; ECF Doc. 71-1 at PageID # 2349, 2363, 2383.
[4] During the hearing, Townsend indicated that he had not spoken with either or received a response from Ms. Glick or Ms. Cofta about representing him as counsel. ECF Doc. 71-1 at PageID # 2365-68.

At a hearing on October 31, 2017, the court denied Townsend's motion to dismiss for preindictment delay, ECF Doc. 70-1 at PageID # 1114, ECF Doc. 71-1 at PageID # 2443, the Rule 47(a)(2)(A) Motion, ECF Doc. 71-1 at PageID # 2431, and the Speedy Trial Motion, *id.* On April 3, 2018, the court held a hearing during which it denied the following motions from Townsend: (i) motion to suppress evidence; (ii) motion for grand jury transcripts; (iii) motion for speedy trial; (iv) motion for dismissal of the indictment; and (v) motion for a change of venue. ECF Doc. 70-1 at PageID # 1134; ECF Doc. 71-1 at PageID # 2504-25.

The following facts were subsequently established by the trial evidence, as described by the Ohio Court of Appeals:

> {¶ 4} On January 20, 2003, Townsend and codefendant Kris Williams abducted M.W. on West 74th Street where Townsend lived with his wife. Both men sexually assaulted her; Townsend forced M.W. to have oral and vaginal sexual intercourse and attempted to have anal intercourse with her. M.W. called police and reported the assault. She went to MetroHealth Hospital for a rape-kit examination.
>
> {¶ 5} M.W. Testified at trial that her attackers were unknown to her and she was unable to identify them. The case was later investigated by the Cuyahoga County Prosecutor's Office Sexual Assault Kit Taskforce. DNA linked Townsend to the DNA recovered in the rape kit – the Ohio Bureau of Criminal Investigations ("BCI") notified authorities that Townsend's and William's DNA were consistent with two DNA profiles recovered from the rape kit. M.W. testified that she was unable to identify Townsend as one of her rapists, but stated that she never had consensual sex with Townsend and the only reason for his DNA to be present was because he was one of her attackers.
>
> {¶ 6} Townsend testified on his own behalf and denied ever meeting M.W. Relative to M.W., the jury convicted Townsend of two counts of rape, one count of complicity to commit rape, and one count of kidnapping with a sexual motivation specification. The jury found Townsend to be a sexually violent predator on these counts.
>
> {¶ 7} C.W. testified that she was raped by Townsend in 2005. C.W., who was only 13 years old at the time of the attack, knew Townsend through her mother. Townsend told them his name was "Desmond Thomas." According to C.W., one night, Townsend broke into her mother's house, said he had a gun, and forced C.W. to have sexual intercourse with him. He also attempted another criminal sex act upon her.

{¶ 8} A month later, C.W. discovered she was pregnant and disclosed to her mother what had happened. They reported the assault to the police. C.W. terminated her pregnancy and the police were able to get a DNA match by matching Townsend's DNA to that of the fetus.

{¶ 9} C.W. and her mother identified Townsend at trial as the person they knew as Desmond Thomas.

{¶ 10} Townsend testified that he knew C.W. and her mother, but he never had sexual intercourse with C.W. He claimed that the DNA samples were contaminated.

{¶ 11} Relative to C.W., the jury found Townsend guilty of one count of rape, one count of attempted rape, and one count of kidnapping with a sexual motivation specification. The jury found that Townsend was a sexually violent predator for these counts. The jury acquitted Townsend of aggravated burglary, one count of rape, and all the firearm specifications regarding this incident.

{¶ 12} On or about November 27, 2006, Townsend assaulted 17-year-old B.G. and forced her to have sexual intercourse with him and criminally touched her.

{¶ 13} B.G., who lived with Townsend and his wife at the time, underwent a sexual assault examination and reported to both the police and the examining nurse that Townsend was her attacker. B.G. did not testify at trial. Townsend testified that he never touched B.G.

ECF Doc. 70-1 at PageID # 1292-94.

The jury found Townsend not guilty on Counts 8, 10, and 16, as well as the firearm specifications under Counts 9, 11, and 12. ECF Doc. 71-1 at PageID # 3721-23; ECF Doc. 70-1 at PageID # 1135-36.[5] The jury found Townsend guilty on all remaining counts (Counts 1-3, 7, 9, and 11-15), and also found him guilty of: (i) the sexually violent predator specifications on

[5] The original journal entry entered by the court erroneously stated that the jury had found Townsend guilty of Counts 8 and 10. *See* ECF Doc. 70-1 at PageID # 1135. This error was subsequently corrected when the trial court entered a nunc pro tunc entry to correct the verdict to reflect that Townsend had been found not guilty of Counts 8 and 10. ECF Doc. 70-2 at PageID # 1829.

Counts 1-3, 7, 9, and 11-15; and (ii) the sexual motivation specifications on Counts 7 and 12. ECF Doc. 71-1 at PageID # 3721-23; ECF Doc. 70-1 at PageID # 1135.[6]

At the sentencing hearing, the court merged Count 12 with Count 9. ECF Doc. 71-1 at PageID # 3803; ECF Doc. 70-1 at PageID # 1138. The court sentenced Townsend to an aggregate sentence of 56 years to life imprisonment. ECF Doc. 70-1 at PageID # 1137-38. The court imposed the following terms of imprisonment that were to be served consecutively: (i) a term of 5 years to life on Counts 1, 2, 3, 7, and 11; (ii) a term of 10 years to life on Counts 9, 13, and 14; and (iii) a 1-year term on Count 15. *Id.* at PageID # 1138.

B. Direct Appeal

1. Notice of Appeal and Assignments of Error

On May 14, 2018, Townsend appealed to the Ohio Court of Appeals. ECF Doc. 70-1 at PageID # 1139. Townsend, through appellate counsel, asserted eight assignments of error: (i) the conviction must be overturned because Townsend did not knowingly waive his right to counsel; (ii) the trial court erred when it improperly convicted Townsend when there was judicial bias present; (iii) the trial court erred by depriving Townsend of his right to self-representation; (iv) the trial court erred by denying Townsend his right to the compulsory process; (v) the trial court erred because his conviction was against the manifest weight of the evidence; (vi) the trial court erred by providing faulty jury instructions; (vii) the sexually violent predator specifications must be vacated because the state produced no evidence of a previous conviction for a sexually violent offense; and (viii) the trial court erred when it failed to merge the allied offenses of

[6] Once again, the original journal entry incorrectly stated the jury had found Townsend guilty of the firearm specifications on Counts 8 and 10, but this was corrected by the later nunc pro tunc entry. *See* ECF Doc. 70-2 at PageID # 1829.

Counts 9 and 12 improperly stated Townsend was found guilty of gun specifications even though 9, 12 merged they still had gun specifications attached and defendant was sentenced convicted on gun specifications so defendant is entitled to Resentencing

Counts 1 and 2, Counts 9 and 11, and Counts 13 and 14, for purposes of sentencing. *Id.* at PageID # 1157-65.

Of significance to his habeas petition, Townsend's appellate brief did not raise any claim concerning: (i) speedy trial rights; (ii) *Brady* violations or suppression of evidence in general; or (iii) the Confrontation Clause of the Sixth Amendment. *See id.* at 1149-66. In his fifth assignment of error concerning the manifest weight of the evidence, Townsend argued that there was insufficient evidence for a conviction of the offenses related to victim B.G. because: (i) she never testified at trial; (ii) the only evidence supporting his conviction was hearsay evidence from medical records; (iii) there was no testimony from family members; and (iv) there was no conclusive DNA evidence. *Id.* at PageID # 1163. However, he never invoked the Confrontation Clause or discussed a violation of his right to confront. *See id.*

2. Untimely Motion for a New Trial

On June 4, 2018, while his appeal was pending, Townsend filed two *pro se* motions: (i) a motion for leave to file an untimely motion for a new trial, *id.* at PageID # 1441; and (ii) a motion for a new trial pursuant to Ohio Crim. R. 33(B), *id.* at PageID # 1442-63. Townsend cited irregularities in the proceedings, bias of the judge, coercion by the prosecution, and insufficient evidence as grounds for a new trial. *Id.* at PageID # 1451-52. On June 11, 2018, the trial court denied Townsend's motion for leave to file a Rule 33(B) motion for a new trial. *Id.* at PageID # 1464.

On July 6, 2018, Townsend filed a *pro se* motion to vacate the trial court's judgment denying his request to file an untimely Rule 33(B) motion. *Id.* at PageID # 1466-67. On July 23, 2018, the trial court denied Townsend's motion to vacate. *Id.* at PageID # 1468.

3. Court of Appeals' Decision and Appeal to the Ohio Supreme Court

On March 28, 2019, the Ohio Court of Appeals sustained Townsend's seventh assignment of error concerning his convictions on the sexually violent predator specifications, but it overruled the remaining assignments of error. *Id.* at PageID # 1210-27. The court vacated Townsend's convictions on the sexually violent predator specifications, as well as the underlying sentences for Counts 1, 2, 3, 7, 9, 10, 11, and 12, and remanded the case to the trial court for resentencing only as to Counts 1, 2, 3, 7, 9, 10, 11, and 12. *Id.* at PageID # 1226-27. The judgment of conviction and the sentence were otherwise affirmed. *Id.* at PageID # 1227

Townsend and the State cross-appealed the decision of the Ohio Court of Appeals. *Id.* at PageID # 1229, 1272-73. On May 3, 2019, Townsend filed a *pro se* memorandum in support of jurisdiction that asserted eight propositions of law which mirrored the eight assignments of error he raised in his brief before the Ohio Court of Appeals.[7] *Compare id.* at PageID # 1232, 1239-48, *with id.* at PageID # 1157-65. As before, Townsend's memorandum did not raise any issues or arguments concerning his speedy trial rights or *Brady* violations/suppression of evidence. *Id.* at PageID # 1231-58. The memorandum did mention for the first time the Confrontation Clause and a violation of Townsend's right to face his accuser, discussing the issue under his fourth proposition of law (violation of the compulsory process). *See id.* at PageID # 1243-44. The State raised a single proposition of law, claiming that the Ohio Court of Appeals erred in vacating the sexually violent predator specifications attached to Counts 1, 2, 3, 7, 9, 10, 11, and 12. *Id.* at PageID # 1285-88.

The Ohio Supreme Court accepted jurisdiction solely over the State's cross appeal and declined to accept jurisdiction over Townsend's appeal. *Id.* at PageID # 1314. On December 10,

[7] For the remainder of all post-conviction proceedings, Townsend continued to represent himself *pro se.*

2020, the Ohio Supreme Court affirmed the judgment of the Ohio Court of Appeals and remanded the case to the trial court for resentencing. *Id.* at PageID # 1432-39.

On remand, the trial court resentenced Brown to an aggregate sentence of 56 years to life imprisonment. ECF Doc. 70-2 at PageID # 1831-32. The court imposed the following terms of imprisonment that were to be served consecutively: (i) a term of 5 years on Counts 1, 2, 3, 7, and 11; (ii) a term of 10 years on Count 9; (iii) a term of 10 years to life on Counts 13 and 14; and (iv) a 1-year term on Count 15. *Id.* at PageID # 1832. After a further appeal, the Ohio Court of Appeals affirmed Townsend's new sentence in a March 10, 2022 decision, *id.* at PageID # 1886-95; and the Ohio Supreme Court declined to exercise jurisdiction over Townsend's appeal of that decision on July 5, 2022, *id.* at PageID # 1935.

C. Initial Petition for Post-Conviction Relief

After the Ohio Court of Appeals had entered its judgment (March 28, 2019), but before he filed his memorandum in support of jurisdiction in the Ohio Supreme Court (May 3, 2019), Townsend filed a petition for post-conviction relief in the trial court on April 18, 2019. *Id.* at PageID # 1469-508. Townsend's memorandum in support asserted violations of his speedy trial rights, and generally discussed allegations of judicial bias, suppression and withholding of evidence by the prosecution, and ineffective assistance of trial counsel. *Id.* at PageID # 1472-89. With his motion, Townsend attached a list of thirty-three "assignment[s] of errors presently anticipated to be raised on appeal." *Id.* at PageID # 1492-507. This list of errors included the assignments of error addressed on direct appeal (e.g., violation of the compulsory process, judicial bias, etc.), and also listed the following errors, relevant to the instant proceeding:

1. Speedy trial violation R.C. 29 45.71, 2946.73(B) motions filed no more continuances at request of Defendant 11-13-2017. Motion for speedy trial immediately. State kept delaying defendant's trial. Motion non waiver of

speedy trial and to proceed to trial immediately over 534 days brought to trial. Trial court erred by not going by voir dire jury instructions.

* * *

5. Trial court erred by not sanctioning state from kept withholding discovery R. 16 Brady material all but not limited favorable and non favorable to Defendant.

6. Trial court erred in not responding to any of Defendant's motion for the state to turn over all Brady material especially the prior original statement of [redacted] (that the defendant was a friend of her mother's and she "never" had any sexual intimate contact with Defendant) that she had been raped by an unknown male while at a friend's home.

* * *

26. Trial court erred in forcing 2nd appointed counsel Craig W. Smotzer to become Defendant's standby counsel after Defendant filed two-3 motions to dismiss counsel for conflict of interest and reported counsel to Public Defender and Bar Assoc.

Id. at PageID # 1492-94, 1505. Townsend also filed a supplement to his petition, which asserted an additional error related to the validity of the indictment. *Id.* at PageID # 1509-14.

On May 2, 2019, the trial court denied Townsend's petition for post-conviction relief and his proposed assignments of error. *Id.* at PageID # 1527. Townsend appealed that ruling to the Ohio Court of Appeals, *id.* at PageID # 1529-34, with his accompanying merits brief asserting 17 assignments of error in support, *id.* at PageID # 1553-92. Two of the assignments of error concerned a speedy trial violation claim, *id.* at PageID # 1567-69, and a claim of ineffective assistance of counsel based on the court having appointed Mr. Smotzer as standby counsel over Townsend's objection, *see id.* at PageID #1582.

On June 4, 2020, the Ohio Court of Appeals *sua sponte* dismissed Townsend's appeal based on lack of jurisdiction because the trial court never issued findings of fact or conclusions of law when it dismissed his petition. *Id.* at PageID # 1605. On December 20, 2020, Townsend

filed a motion for reconsideration of the Ohio Court of Appeals' *sua sponte* dismissal. *Id.* at PageID # 1606-13. On December 22, 2020, the Ohio Court of Appeals denied the motion for reconsideration. *Id.* at PageID # 1620.

⇒ In February 2021, Townsend filed a notice of appeal to the Ohio Supreme Court, *id.* at PageID # 1621-24, and then filed an amended motion for a delayed appeal the following month, *id.* at PageID # 1625-28. On April 13, 2021, the Ohio Supreme Court granted the motion for a delayed appeal and ordered Townsend to file a memorandum in support of jurisdiction within 30 days. *Id.* at PageID # 1629. On May 21, 2021, the Ohio Supreme Court dismissed the appeal for failure to prosecute, noting Townsend had not filed a memorandum in support of jurisdiction by the May 13, 2021 deadline. *Id.* at PageID # 1630.

D. App. R. 26(B) Application for Reopening

On October 8, 2019, Townsend filed an application for reopening his direct appeal pursuant to Ohio Rule 26(B). *Id.* at PageID # 1631-58. As relevant to his habeas petition, Townsend asserted the following assignments of error: (i) a claim that his speedy trial rights were violated because he was not brought to trial within the timeframe set forth under Ohio statutes and a failure to dismiss this action would violate his rights to Due Process and Equal Protection, *id.* at PageID # 1632-33; (ii) a claim that his Confrontation Clause rights were violated when an alleged victim (B.G.) did not testify at trial but the court alleged an examining nurse to give testify as to statements made to her by the victim, *id.* at PageID # 1633-34; (iii) a claim for a *Brady* violation based on the trial court failing to compel the state to produce exculpatory evidence, *id.* at PageID # 1636; and (iv) a claim that his right to compulsory process

was violated based on the trial court's refusal to compel a witness to appear, *id.* at PageID. # 1638.[8]

On March 5, 2021, the Ohio Court of Appeals denied Townsend's Rule 26(B) application for reopening, finding that Townsend was unable to demonstrate that his appellate counsel was deficient or that he was prejudiced through any of his proposed assignments of error. *Id.* at PageID # 1671-87. In denying Townsend's first assignment of error for a speedy trial violation, the court stated:

> {¶ 6} Townsend, through his first proposed assignment of error, argues that appellate counsel failed to argue on appeal the claim of a lack of speedy trial. Specifically, Townsend argues that he was not brought to trial within 270 days as required by the triple count provision found in R.C. 2945.71(E).
>
> {¶ 7} The Supreme Court of Ohio, regarding speedy trial and the application of the triple count provision, has established that:
>
> > Speedy-trial provisions are mandatory, and, pursuant to R.C. 2945.73(8), a person not brought to trial within the relevant time constraints "shall be discharged," and further criminal proceedings based on the same conduct are barred. R.C. 2945.72(D). A person charged with a felony shall be brought to trial within 270 days of the date of arrest. R.C. 2945.71(C)(2). If that person is held in jail in lieu of bail, then each day of custody is to be counted as three days. R.C. 2945.71(E). This "triple count" provision applies only when the defendant is being held in jail solely on the pending charge. *State v. MacDonald* (1976), 48 Ohio St.2d 66, 2 O.O.3d 219, 357 N.E.2d 40, paragraph one of the syllabus (construing former R.C. 2945.71(D), now (E)). Thus, the triple-count provision does not apply when a defendant is being held in custody pursuant to other charges. *Id.*
>
> *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, 853 N.E.2d 283, ¶ 7.
>
> {¶ 8} Herein, Townsend was previously convicted in an unrelated criminal case, on December 21, 2009, of the offenses of aggravated robbery, robbery, and having weapons while under disability and sentenced to incarceration for a period of 12 years. *See State v. Townsend*, Cuyahoga C.P. No. CR-09-531966-A. Thus, the triple-count provision of R.C. 2945.71(E) was not applicable to the criminal

[8] The other assignments of error concerned the trial court's denial of Townsend's: (i) motion for judgment of acquittal; (ii) motion to sever charges; (iii) motions to suppress evidence; (iv) requests to submit favorable evidence; (v) request for a hearing; and (vi) request for post-conviction DNA testing. ECF Doc. 70-1 at PageID # 1635-37, 1639-40.

> charges brought in CR-17-614508-A. *State v. Brown*, 64 Ohio St.3d 476, 597 N.E.2d 97 (1992).
>
> {¶ 9} In addition, a review of the docket in CR-17-614508-A clearly demonstrates that Townsend was brought to trial within 270 days after being delivered into custody for trial. The record reflects numerous continuances for discovery, withdrawal of counsel, pretrials, motions to dismiss, and motions for change of venue, and motions to dismiss the presiding judge that tolled the running of the 270 day requirement for trial. *State v. Logan*, 8th Dist. Cuyahoga No. 99471, 2014-Ohio-816. Townsend has failed to establish that he was prejudiced through his first proposed assignment of error.

ECF Doc. 70-1 at PageID # 1673-74.

In denying the proposed second assignment of error concerning the Confrontation Clause, the court stated:

> {¶ 11} Townsend, through his second proposed assignment of error, argues that testimony from a nurse, regarding medical records relating to a victim, violated the Sixth Amendment's Confrontation Clause. However, statements made to medical personnel and contained in medical records are nontestimonial and admissible under Evid.R. 803(4). Testimony regarding statements made to medical personnel does not violate the Confrontation Clause. *State v. Ford*, 8th Dist. Cuyahoga No. 105865, 2018-Ohio-3563; *State v. Steele*, 8th Dist. Cuyahoga Nos. 101139 and 101140, 2014-Ohio-5431; *State v. Bowleg*, 8th Dist. Cuyahoga Nos. 100263 and 100264, 2014-Ohio-1433. Townsend has failed to establish prejudice through his second proposed assignment of error.

Id. at PageID # 1675. The court denied the fifth proposed assignment of error concerning the claimed *Brady* violation, after reviewing the transcript and finding that it clearly demonstrated that Townsend was provided with all exculpatory evidence and that Townsend withdrew his request for independent DNA analysis. *Id.* at PageID # 1677-83. Finally, the court denied the ninth proposed assignment of error[9] concerning the right to compulsory process, stating:

> {¶ 34} Townsend, through his ninth proposed assignment of error, argues that he was denied the right to compulsory process. However, Townsend has failed to specifically identify any witness that was not subjected to compulsory process. In addition, to establish a violation of the right to compulsory process, a defendant must make some plausible showing of how the witness's testimony would have

[9] The Ohio Court of Appeals' analysis concerning the remaining proposed assignments of error are omitted because they involve claims that are not asserted in the instant habeas proceeding.

been both material and favorable to his defense." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982); *State v. Brown*, 8th Dist. Cuyahoga No. 86544, 2006-Ohio-2573, ¶ 104. Townsend has failed to demonstrate how the testimony of any excluded witness would have resulted in a different outcome at trial. *State v. Jackson*, 8th Dist. Cuyahoga No. 108241, 2019-Ohio-4893; *State v. Jackson*, 8th Dist. Cuyahoga No. 105919, 2018-Ohio-1633. Townsend has failed to establish any prejudicial error through his ninth proposed assignment of error.

Id. at PageID #1685-86.

On April 5, 2021, Townsend appealed the denial of his Rule 26(B) application to reopen to the Ohio Supreme Court.[10] ECF Doc. 70-2 at PageID # 1696. Townsend's memorandum in support of jurisdiction asserted eleven propositions of law – which mirrored the eleven proposed assignments of error he asserted before the Ohio Court of Appeals. *Compare id.* at PageID # 1700-12; *with* ECF Doc. 70-1 at PageID # 1632-40. On June 22, 2021, the Ohio Supreme Court declined to exercise jurisdiction. ECF Doc. 70-2 at PageID # 1763.

E. Additional Post-Conviction Proceedings

1. Filings in the Trial Court

Between June 2021 and August 2022, Townsend filed several post-conviction motions with the trial court; including: (i) a post-conviction petition for relief relating to the waiver of an allocution statement; *id.* at PageID # 1936-43; (ii) a "motion for petition of postconviction relief" that requested an order for the production of all discovery, *id.* at PageID # 1944-46; (iii) a "motion to discharge" for lack of subject matter jurisdiction, which raised issues related to speedy trial violations; *id.* at PageID # 1947-50; (iv) a "resentencing post-conviction petition [for] relief" that raised issues related to ineffective assistance of counsel, *id.* at PageID # 1951-63; and (v) a "petition to correct void sentence" that raised issues concerning the

[10] In March 2021, Townsend had filed a motion for reconsideration of the denial of his Rule 26(B) application to reopen, ECF Doc. 70-2 at PageID # 1764, which the Ohio Court of Appeals denied as inapplicable, *id.* at PageID # 1785.

Confrontation Clause and the use of statements by the examining nurse who testified concerning victim B.G., *id.* at PageID # 1964-68. On August 22, 2022, Townsend filed another post-conviction petition for relief. *Id.* at PageID # 1969-87. In relevant part, the August 2022 petition for post-conviction relief argued that Townsend's appellate counsel was ineffective for failing to raise claims relating to: (i) speedy trial rights under Ohio statutes; (ii) judicial and prosecutorial misconduct and abuse of judicial discretion; (iii) a *Brady* violation for allegedly withholding exculpatory evidence; (iv) an abuse of discretion by the court for allowing out of court statements that violated the Confrontation Clause; and (v) denying the compulsory process. *Id.* at PageID # 1971-77.

On May 1, 2023, the trial court denied all these and other outstanding motions as moot. *Id.* at PageID # 2054.

2. Second Rule 26(B) Motion in the Ohio Court of Appeals

In June 2022, Townsend filed a second Rule 26(B) application for reopening of his direct appeal, wherein he asserted 26 proposed assignments of error. *Id.* at PageID # 2077-116. In August 2022, the State filed a motion to strike Townsend's Rule 26(B) application for reopening because the filing exceeded the ten-page limitation under App. R. 26(B)(4). *Id.* at PageID # 2199-201. The state also filed a memorandum in opposition, which argued that Townsend's assignments of error were either barred by the doctrine of res judicata or lacked merit. *Id.* at PageID # 2204-10. Townsend filed a notice to amend his Rule 26(B) application for reopening. *Id.* at PageID # 2229-40. The Ohio Court of Appeals denied Townsend's motion to amend, noting that: (i) there was no provision for amending an application to reopen; (ii) amending an application may be considered a successive application for reopening; and (iii) there was not a right to file successive applications for reopening. *Id.* at PageID # 2241.

On December 5, 2022, the Ohio Court of Appeals denied Townsend's second Rule 26(B) application for reopening. *Id.* at PageID # 2242-50. First, the court determined that, for all 26 proposed assignments of error, Townsend failed to present any viable argument to establish that his appellate counsel was deficient or that Townsend was prejudiced by the proposed errors – "Merely reciting assignments of error, without demonstrating prejudice and presenting legal argument and analysis, is not sufficient to support an App.R. 26(B) application for reopening." *Id.* at PageID # 2244-45. Second, the court determined that proposed assignments of error Nos. 2 through 13 and Nos. 15 through 25 were barred from consideration under the doctrine of the law-of-the-case because they constituted a collateral attack on the appellate decision that affirmed Townsend's convictions on direct appeal. *Id.* at PageID # 2245-46. Third, the court determined that Townsend had failed to demonstrate deficient performance of counsel or prejudice for the remaining proposed assignments of error (Nos. 1, 14, and 26).[11] *Id.* at PageID # 2247-49. Finally, the court found that Townsend's Rule 26(B) application was procedurally defective, stating:

> {¶ 18} In addition, Townsend's application for reopening is procedurally defective because it exceeds the ten-page limitation established by App.R. 26(B)(4). Townsend's application for reopening consists of 16 pages, which does not include his sworn affidavit and various exhibits. Exceeding the ten-page limitation of App.R. 26(B)(4) constitutes a valid basis for the denial of Townsend's application for reopening. *State v. Murawski*, 8th Dist. Cuyahoga No. 70854, 2002-Ohio-3631[.]

Id. at PageID # 2249 (additional citations omitted).

[11] Proposed assignment of error Nos. 1, 14, and 26, all concerned Townsend's appellate counsel during his appeal from resentencing, *see* ECF Doc. 70-2 at PageID # 2247-49, which is irrelevant to the issues raised in the instant proceeding.

On March 28, 2023, the Ohio Supreme Court declined to accept jurisdiction over Townsend's appeal of the Ohio Court of Appeals' decisions to deny his Rule 26(B) application for reopening and his motion to amend that application. *Id.* at PageID # 2297.

II. Townsend's Habeas Petition

On December 1, 2021, Townsend, still proceeding *pro se*, filed a petition for writ of habeas corpus under 28 U.S.C. § 2254, initiating the instant proceedings. ECF Doc. 1. On April 27, 2022, the court ordered Townsend to file a singular amended petition that outlined all the constitutional claims he wished to raise and attached all relevant evidence related to those claims. ECF Doc. 54 at PageID # 726, 731-32. Townsend filed an amended petition for writ of habeas corpus under 28 U.S.C. § 2254 on June 2, 2022. ECF Doc. 59. Townsend alleged the six claims for relief set forth at pages 1-2 above. *Id.* at PageID # 787-805.

III. Law and Analysis:

As an initial note, the amended habeas petition sets forth six claims for relief and provides some supporting facts for each ground, but it did not provide arguments to support the merits of each claim nor did it provide an explanation as to the precise scope and nature of each claim. *See id.* Townsend filed neither a memorandum in support of his amended habeas petition nor a traverse or other response to Warden Foley's return of writ. As such, Townsend has not provided any explicit arguments to support his grounds for relief.

A. Ground One – Speedy Trial Violation

For his Ground One claim, Townsend simply states that he is asserting a "speedy trial" claim and provides the following facts to support his claim: (i) he was indicted in January 2007; (ii) the case was dismissed for want of prosecution in April 2008; (iii) he was re-indicted on February 22, 2017; (iv) he filed a motion for a speedy trial and motion to dismiss in March 2017;

and (v) the trial court denied those motions on the day of the trial. *Id.* at PageID # 787. Warden Foley responds that Townsend's Ground One claim is procedurally defaulted because he failed to raise a speedy trial violation claim on direct appeal in the Ohio Court of Appeals. ECF Doc. 70 at PageID # 1000-02. Warden Foley alternatively argues that Townsend's Ground One claim fails on the merits because Townsend has not demonstrated that the state court's adjudication on the merits was contrary to established Supreme Court precedent or unreasonable given the evidence before the court. *Id.* at PageID # 1007-11.

1. Procedural Default

"Before [a federal court may] reach the merits of a habeas petition, . . . [it must] review whether the petitioner has satisfied the [two] procedural requirements for litigating his federal claim in state court." *Gerth v. Warden, Allen Oakwood Corr. Inst.*, 938 F.3d 821, 826 (6th Cir. 2019) (citing *Bickham v. Winn*, 888 F.3d 248, 250-51 (6th Cir. 2018), and *Seymour v. Walker*, 224 F.3d 542, 550 (6th Cir. 2000)). First, a habeas petitioner who raises claims that the state courts violated his federal constitutional rights, must give the state courts a "*fair*" opportunity to act on his claims. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (emphasis in original). If the petitioner hasn't done so and has no legal mechanism by which to do so now, the claim he failed to present is procedurally defaulted; which means this court cannot act on the claim either. *See Gray v. Netherland*, 518 U.S. 152, 161-62 (1996); *Williams v. Anderson*, 460 F.3d 789, 809 (6th Cir. 2006). For a claim to have been fairly presented, the factual and legal basis of the claim asserted by the petitioner must have raised at every available stage of state review. *Wagner v. Smith*, 581 F.3d 410, 418 (6th Cir. 2009); *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000); *see also Williams*, 460 F.3d at 806. And the petitioner must have presented "his claim to

the state courts as a federal constitutional issue – not merely as an issue arising under state law." *Williams*, 460 F.3d at 807 (quotation marks omitted).

"Second, and relatedly, the procedural default doctrine bars [federal habeas] review if the petitioner has not followed the state's procedural requirements for presenting his claim in state court." *Gerth*, 938 F.3d at 827. Thus, a federal court will not review a state prisoner's habeas claim if: (i) the petitioner has failed to comply with a state procedural rule; (ii) the state courts enforced the rule; (iii) the state procedural rule is an adequate and independent state law ground for denying review of a federal constitutional claim; and (iv) the petitioner cannot show cause and prejudice to excuse the default. *See Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986).

Here, Townsend did not raise his Ground One speedy trial claim in his direct appeal – with the issue absent from his merits brief before the Ohio Court of Appeals and from his memorandum in support of jurisdiction before the Ohio Supreme Court. *See* ECF Doc. 70-1 at PageID # 1157-65, 1231-58. Because Townsend did not pursue his claim at each and every level of review on direct appeal in the state courts, the claim is procedurally defaulted.[12] *See Wagner*, 581 F.3d at 418; *Williams*, 460 F.3d at 806; *see also State v. Moreland*, 50 Ohio St.3d 58, 62, 552 N.E.2d 894, 899 (Ohio 1990) (providing that a failure to present a claim to a state court of appeals constituted a waiver) (citing *State v. Broom*, 40 Ohio St. 3d 277, 288-89, 533 N.E. 2d 682, 695-96 (Ohio 1988))).

[12] Townsend's claim is procedurally defaulted despite him having asserted a speedy trial claim in his various post-conviction petitions and applications for reopening, *see, e.g.*, ECF Doc. 70-1 at PageID # 1477, 1492, 1567-69, 1632-33, because presenting a new claim for the first time to a state court on discretionary review does not constitute fair presentation at every level and stage of state review. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989); *see also White v. United States*, 8 F.4th 547, 554 (7th Cir. 2021) ("A claim not raised on direct appeal generally may not be raised for the first time on collateral review and amounts to procedural default.").

for *federal* constitutional violations. 28 U.S.C. § 2254(a). "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle*, 502 U.S. at 67-68. Thus, "federal habeas corpus relief does not lie for errors of state law." *Lewis*, 497 U.S. at 780.

Townsend's amended petition does not specify or explain the precise nature of the speedy trial claim he wishes to assert under Ground One. As such, the court turns to the state record for clues. Every time that Townsend attempted to raise a speedy trial claim during post-conviction proceedings (e.g., petitions for post-conviction relief or Rule 26(B) applications), he would: (i) assert the claim as a violation of speedy trial rights under Ohio statutes; (ii) cite some combination of Ohio Rev. Code §§ 2945.71, 2945.72, 2945.73, or 2941.401; and (iii) explicitly discuss deadlines and time frames set forth under Ohio statute.[14] *See* ECF Doc. 70-1 at PageID # 1469, 1477, 1482, 1492, 1632-33; ECF Doc. 70-2 at PageID # 1700, 1702-03, 1705-06, 1971-72, 1949, 2105, 2231. Moreover, the State and the Ohio Court of Appeals viewed Townsend as having asserted a state law claim, with the State's merits brief in the Ohio Court of Appeals, and the Ohio Court of Appeals' decision, addressing Townsend's speedy trial claim solely in terms of Ohio statutory speedy trial rights. *See* ECF Doc. 70-1 at PageID # 1662-64, 1673-74.

[14] In his first Rule 26(B) application to reopen, Townsend specifically argues that his case must be dismissed because he was not brought to trial within the time set forth under Ohio statute. ECF Doc. 70-1 at PageID # 1633. He then stated that if the case is not dismissed, his Due Process and Equal Protection rights under the United States Constitution would be violated. *Id.* This invocation of the United States Constitution does not convert Townsend's state law speedy trial claim into a federal constitutional claim (as Townsend was specifically arguing that the violation of Ohio speedy trial law, by itself, equaled a federal constitutional violation) and Townsend did not otherwise fairly present or notify the State or the Ohio Court of Appeals he intended to assert a federal speedy trial claim.

Accordingly, the undersigned finds that Townsend previously asserted in state court (during post-conviction proceedings), and currently asserts on federal habeas review, a claim that his speedy trial rights were violated solely under Ohio law. This claim is not cognizable on federal habeas review because it asserts a violation of the Ohio speedy trial statute, which is a state-law issue. *See Estelle*, 502 U.S. at 67-68 ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Moreover, courts in the Sixth Circuit have consistently held that claims based solely on a violation of Ohio's speedy trial statute do not present a cognizable claim for federal habeas relief. *See, e.g.*, *Norris v. Schotten*, 146 F.3d 314, 329 (6th Cir. 1998), *Hutchison v. Marshall*, 744 F.2d 44, 45-47 (6th Cir. 1984); *Phillips v. Schweitzer*, No. 3:18-cv-02556, 2020 U.S. Dist. LEXIS 254995, at *25-26 (N.D. Ohio Nov. 10, 2020) (collecting cases), *report and recommendation adopted*, 2021 U.S. Dist. LEXIS 98363 (N.D. Ohio May 24, 2021); *Taylor v. Warden, London Corr. Inst.*, No. 2:16-CV-780, 2017 U.S. Dist. LEXIS 166071, at *7-8 (S.D. Ohio Oct. 6, 2017) (same); *see also Hopkins v. Banks*, No. 1:09CV0387, 2010 U.S. Dist. LEXIS 140516, at *9 (N.D. Ohio Dec. 14, 2010) ("When a petitioner in a federal habeas corpus proceeding asserts the denial of his right to a speedy trial as a violation of state law, the claim is not cognizable."), *report and recommendation adopted*, 2011 U.S. Dist. LEXIS 7538 (N.D. Ohio Jan. 26, 2011).

A state court's determination on a state law issue may become cognizable under the "fundamental fairness" principle, when the decision offends "some principal of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000) (quoting *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996)); *see also Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003) (explaining that state-law errors must be "so egregious that [they] result in a denial of fundamental fairness"). However,

the Sixth Circuit has held that the fundamental fairness doctrine does not apply to statutory speedy trial claims because such claims have "nothing whatsoever to do with the fairness of the trial itself . . . [but rather] goes to the fairness of [the petitioner's] extended pretrial detention." *Norris*, 146 F.3d at 323-29 (quoting *Hutchison*, 744 F.2d at 47) (alteration in original).

Accordingly, even if Townsend's Ground One claim were not procedurally defaulted, I would recommend that this claim be DISMISSED as noncognizable.

B. Ground Two – *Brady* Claim

Under Ground Two, Townsend seemingly asserts a *Brady* claim for a violation of his Due Process rights, and he provides several pages of transcripts from various hearings in the trial court that demonstrate Townsend believed he was not provided with all exculpatory evidence and did not have access to certain DNA evidence. ECF Doc. 50 at PageID # 789-95. Warden Foley contends that Townsend's Ground Two claim is both procedurally defaulted, ECF Doc. 70 at PageID # 1000-02, and meritless, *id.* at PageID # 1011-18.

1. Procedural Default

Townsend's Ground Two claim, alleging a due process violation under *Brady v. Maryland*, is also procedurally defaulted because it was not raised in his direct appeal before the Ohio Court of Appeals and before the Ohio Supreme Court. *See* ECF Doc. 70-1 at PageID # 1149-67, 1231-71. Rather, this claim was presented for the first time in the context of petitions for post-conviction relief and applications for reopening, filed after the initiation of his direct appeal.[15] *See id.* at PageID # 1493-94, 1636. Because Townsend did not pursue his *Brady* claim

[15] As discussed above in regard to Townsend's Ground One claim, the assertion of a *Brady* claim for first time in a post-conviction petition or an application for reopening does not save the claim from procedural default, because presenting a new claim for the first time to a state court on discretionary review does not constitute fair presentation at every stage of state court review. *See Castille*, 489 U.S. at 351; *White*, 8 F.4th at 554.

at each and every level of direct review in the state courts, the claim is procedurally defaulted. *See Wagner*, 581 F.3d at 418; *Williams*, 460 F.3d at 806. Moreover, as with his Ground One claim, Townsend has failed to argue or demonstrate cause to excuse the procedural default of his Ground Two claim, and he has not argued or demonstrated that his procedural default should be excused on the basis that he is actually innocent.[16]

Because Townsend's Ground Two claim is procedurally defaulted and he has not established an exception to overcome this default, I recommend that the Ground Two claim be DISMISSED as procedurally defaulted.

2. Alternative Merits Analysis

Alternatively, even if Townsend's Ground Two claim were not procedurally defaulted, the claim would fail on the merits.

a. AEDPA Deference

Because the Ohio Court of Appeals considered the merits of Townsend's *Brady* claim when it denied his initial Rule 26(B) application for reopening, his Ground Two claim is subject to the deferential reasonableness standard under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). AEDPA permits a federal court to grant habeas relief only if the challenged state court decision: (i) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court; or (ii) was based on an unreasonable determination of the facts in light of the record before the state court. 28 U.S.C. § 2254(d). "Unreasonable" doesn't simply mean that the state court got it wrong. *Chinn v.*

[16] As with his Ground One claim, Townsend may have wished a argue cause based on ineffective assistance of appellate counsel. But he did not raise this argument or a corresponding ineffective assistance of appellate counsel claim in this habeas proceeding, and the Ohio Court of Appeals previously determined that Townsend's appellate counsel was not deficient for failing to raise a *Brady* claim on direct appeal. ECF Doc. 701- at PageID # 1677-83.

Warden, Chillicothe Corr. Inst., 24 F.4th 1096, 1101 (6th Cir. 2022). Only if no "fairminded jurist" could agree with the state court may we grant relief. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The petitioner must show that the state court's "decision was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

b. Establishing a *Brady* Claim

A criminal defendant's due process rights are violated when the prosecution suppresses evidence that is both favorable to the defendant and material to either guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To establish a *Brady* violation, a petitioner must show: (i) the withheld evidence favors him because it is exculpatory or impeaching; (ii) the state suppressed that evidence; and (iii) the suppression of that evidence prejudiced him. *England v. Hart*, 970 F.3d 698, 716 (6th Cir. 2020) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). "Prejudice (and materiality) is established by showing that 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* at 717 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). In other words, the petitioner must show that a substantial likelihood of a different result such that it undermines confidence in the proceeding, not just a "conceivable" possibility of a different result. *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); Bagley, 473 U.S. at 678; *LaMar v. Houk*, 798 F.3d 405, 416 (6th Cir. 2015); *Harrington*, 562 U.S. 86, 112 (2011)).

c. Discussion

Reviewing the *Brady* claim Townsend asserted in his initial Rule 26(B) application (ECF Doc. 70-1 at PageID # 1636), the Ohio Court of Appeals determined, after reviewing the trial

court record, that Townsend's claim lacked merit. *Id.* at PageID # 1677-83. The court initially determined the scope of Townsend's claim, stating:

> {¶ 20} Townsend, through his fifth proposed assignment of error, argues that the trial court erred by not granting a "Brady" motion. Specifically, Townsend argues that he was not provided with all discovery, that included exculpatory evidence, held by the prosecutor. In addition, Townsend argues that he was prejudiced by the trial court's failure to allow for an independent DNA analysis.

Id. at PageID # 1678. The court then found the record demonstrated that "Townsend was provided with all discovery and exculpatory evidence" and that Townsend had rescinded his request for independent DNA analysis, citing specific portions of the transcript. *Id.* at PageID # 1678-83 (citing ECF Doc. 71-1 at PageID # 2413-21). Based on these findings, the court determined that Townsend had failed to demonstrate any prejudicial error from his appellate counsel declining to raise a *Brady* claim on direct appeal. *Id.* at PageID # 1683.

Essentially, the Ohio Court of Appeals found no merit to Townsend's *Brady* claim, because there was nothing indicating that evidence was suppressed, a fundamental requirement to establish a *Brady* violation. *England*, 970 F.3d at 716. The state court's decision is neither contrary to nor an unreasonable application of federal law. And, on the record before the state courts, it was not unreasonable for the state court to conclude that no evidence had been suppressed and Townsend lacked a viable *Brady* claim. Notably, Townsend has presented no arguments to refute the state court's determination or to demonstrate that there was not only the suppression of exculpatory evidence, but that this alleged suppression would have had a reasonable probability of affecting the outcome of the trial. Because Townsend has not made these showings, his Ground Two claim fails on the merits.

Accordingly, even if Townsend's claim were not procedurally defaulted, we would be bound to dismiss it for lack of merit.

C. Ground Three – Confrontation Clause Violation

Townsend labeled his Ground Three claim as a "Confrontation Clause" violation and provided as supporting facts: (i) portions of the trial transcript that concern victim B.G. not testifying at the trial; and (ii) citation to Townsend's objections to the examining nurse testifying as to statements made by B.G. ECF Doc. 59 at PageID # 796-98. Warden Foley first contends that Townsend's Ground Three claim is procedurally defaulted because he failed to raise the issue on direct appeal. ECF Doc. 70 at PageID # 1000-02. Warden Foley alternatively argues that Townsend's Ground Three claim lacks merit and otherwise constitutes a harmless error. *Id.* at PageID # 1018-23.

1. Procedural Default

Townsend's Ground Three claim, alleging a violation of his right to confront his accuser under the Sixth Amendment of United States Constitution, is procedurally defaulted because it was not fairly presented at each stage of his state court direct appeal. Townsend did not raise a "Confrontation Clause" claim in his direct appeal before the Ohio Court of Appeals. *See* ECF Doc. 70-1 at PageID # 1149-67, 1231-71. Townsend did raise a manifest weight of the evidence claim before the Ohio Court of Appeals, asserting that his convictions as to B.G. were against the manifest weight of evidence because: (i) there was no testimony from B.G. or her family members; (ii) there was no DNA evidence to conclusively link Townsend to the offenses; and (iii) the entire case was based on hearsay evidence from medical records. *Id.* at PageID # 1163. But this claim did not mention or invoke a violation of the Sixth Amendment right to confront nor did it cite or reference any federal law. *See id.* And the Ohio Court of Appeals did not evaluate a Sixth Amendment Confrontation Clause violation. Rather, it treated this claim entirely as a manifest weight of the evidence claim. *Id.* at PageID # 1218-22.

The first time Townsend alleged a violation of his confrontation rights was in the Ohio Supreme Court when he sought an appeal of the Ohio Court of Appeals' decision affirming his convictions and rejecting his manifest weight of the evidence claim. Under the proposition of law setting forth his manifest weight of evidence claim, Townsend added a subheading which asked whether his convictions were "against the weight of evidence in violating [Townsend's] rights to face his accusor [*sic*] face to face." *Id.* at Page # 1245. However, the text of the argument under this section made no further mention of the right to confront witnesses and focused solely on the lack of sufficient evidence in general. *See id.* The Ohio Supreme Court declined to accept jurisdiction over all of Townsend's claims on direct appeal. *Id.* at PageID # 1314.

Accordingly, Townsend's Ground Three claim is procedurally defaulted, because he failed to fairly present his Confrontation Clause claim at every stage of Ohio's appellate review process.[17] *See Wagner*, 581 F.3d at 418; *Williams*, 460 F.3d at 806; *see also Townsend v. Warden, Belmont Corr. Inst.*, 598 F.3d 281, 285 (6th Cir. 2010) (holding a petitioner's claims procedurally defaulted when they were raised for the first time in a petition to the Ohio Supreme Court, which denied jurisdiction without comment).

Furthermore, Townsend has not shown cause, prejudice, or actual innocence to overcome this procedural default. *See Hinkle*, 271 F.3d at 245. He has not made any argument that his procedural default should be excused. In denying Townsend's Rule 26(B) application to reopen

[17] As discussed in regard to the Ground One and Ground Two claims, Townsend's attempt to assert a "Confrontation Clause" claim for first time – arguably – in his effort to continue his direct appeal in the Ohio Supreme Court and then fully in his first Rule 26(B) application for reopening, did not save his claim from procedural default. *Castille*, 489 U.S. at 351 (explaining that raising a claim for the first time to the highest state court on discretionary review does not fairly present or exhaust the claim in state court); *White*, 8 F.4th at 554 ("A claim not raised on direct appeal generally may not be raised for the first time on collateral review and amounts to procedural default.").

his direct appeal, the Ohio Court of Appeals considered and denied on the merits his ineffective assistance of appellate counsel arguments asserting a failure to present a Confrontation Clause claim. *See* ECF Doc. 70-1 at PageID # 1633-34; 1675; *Fields*, 2023 U.S. App. LEXIS 20863 at *9 (recognizing that to show cause in an effort to excuse procedural default the underlying ineffective assistance claim must have merit). Townsend has not argued that this decision was contrary to or an unreasonable application of clearly established federal law. Thus, he has not shown cause for his failure to raise a Confrontation Clause claim on his direct appeal. And, although the Ohio Court of Appeals went so far as to hold that there was no prejudice from the use of medical records and medical provider testimony, a failure to establish cause makes it unnecessary for this court to consider prejudice. *Matthews v. Ishee*, 486 F.3d 883, 891 (6th Cir. 2007). Townsend has also not shown that the state court's denials of his ineffective assistance of counsel claims amounted to a fundamental miscarriage of justice or that he was actually innocent of the offenses of conviction. *Coleman*, 501 U.S. at 750.

Accordingly, I recommend that Townsend's Ground Three claim be DISMISSED as procedurally defaulted.

2. Alternative Merits Analysis

Alternatively, even if Townsend's Ground Three claim were not procedurally defaulted, I would recommend it be denied for lack of merit. Because the amended habeas petition does not state the precise nature of Townsend's Ground Three claim, we must look to the state court record. When Townsend asserted his "Confrontation Clause" claim in state court, he argued that it was improper for B.G.'s treating nurse to testify about B.G.'s sexual assault examination and the related medical report because allowing such testimony denied Townsend his right to

confront his accuser, B.G., as guaranteed by the Confrontation Clause. ECF Doc. 70-1 at PageID # 1634. This argument lacks merit.

Townsend's Ground Three claim is subject to AEDPA's deferential reasonableness standard, because the Ohio Court of Appeals considered and rejected the merits of his argument when it denied his Rule 26(B) application for reopening. ECF Doc. 70-1 at PageID # 1675. Under this deferential standard, the relevant question isn't whether the state court got it right or wrong, but whether the state court's determination was "unreasonable–a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). The habeas petitioner must show that the state court's "decision was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for a fairminded disagreement." *Harrington*, 562 U.S. at 103.

The Confrontation Clause of the Sixth Amendment proscribes the admission of out-of-court testimonial statements by a non-testifying witness unless the witness is unavailable, and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). A statement is "testimonial" when its primary purpose is to establish or prove past events of potential relevance to a later criminal prosecution. *Ohio v. Clark*, 576 U.S. 237, 244 (2015). "Thus, under our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial. 'Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.'" *Id.* at 245 (quoting *Michigan v. Bryant*, 562 U.S. 344, 359 (2011)). In making this "primary purpose" inquiry, a court must consider the circumstances under which the statements were made, which requires weighing factors such as whether the statement was made during or immediately after the crime, in the course of assisting police in the apprehension of the

perpetrator, or in the course of medical treatment for the purposes of treatment and diagnosis. *Davis v. Washington*, 547 U.S. 813, 827-28 (2006); *see, e.g., Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312, n.2 (2009) ("[M]edical reports created for treatment purposes . . . would not be testimonial.")

"Nontestimonial hearsay, however, is exempted from Confrontation Clause scrutiny altogether." *Woods v. Smith*, 660 F. App'x 414, 427 (6th Cir. 2016) (quotation marks omitted, citing *Crawford*, 541 U.S. at 68); *Crawford*, 541 U.S. at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framer's design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.").

When the Ohio Court of Appeals found no merit in Townsend's proposed second assignment of error (the Confrontation Clause claim), the court found that the admission of B.G.'s statements to Nurse Schreiber, who was the Sexual Assault Nurse Examiner ("SANE"), did not violate the Confrontation Clause because they were nontestimonial, and were admissible under the Ohio Rules of Evidence. ECF Doc. 70-1 at PageID # 1675. The court also cited a host of Ohio court decisions holding that "[t]estimony regarding statements made to medical personnel does not violate the Confrontation Clause." *Id.* At trial, Nurse Schreiber testified about what B.G. told her during the SANE exam, which led to the creation of Schreiber's narrative report, including B.G.'s report that Townsend had sexually assaulted her. ECF Doc. 71-1 at PageID # 3132-33. Nurse Schreiber testified about the medical nature and purposes of the SANE exam, and the court found that there was no indication that the narrative report was created and taken solely for legal purposes. *See id.* at PageID # 3084-139.

Townsend has not provided any factual or legal argument as to how this decision regarding Nurse Schreiber's testimony: (i) contravened or misapplied *Crawford* or other Supreme Court precedent; or (ii) was based upon an unreasonable factual determination. Even if Townsend had presented such arguments, they would lack merit. In *Dorsey v. Cook*, the Sixth Circuit addressed a situation quite similar to this case, in which a habeas petitioner argued that his rights under the Confrontation Clause were violated by the admission of testimony from a sexual assault nurse examiner. 677 F. App'x 265, 266 (2017). In that case, the nurse examiner testified that the evaluation of the victim was for both medical and legal purposes, she collected information related to the sexual assault, and "the victim signed a consent form that authorized her to provide information to law enforcement for purposes of criminal investigation and prosecution." *Id.* The court denied the petitioner's claim for relief, providing the following rationale:

> [T]he state appellate court's denial of Dorsey's confrontation claim was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent. The Supreme Court has not addressed whether a statement is testimonial when it is made for the dual purpose of obtaining medical care and providing evidence for later criminal prosecution. Nothing in *Crawford* or subsequent Supreme Court cases interpreting the meaning of "testimonial," including the cases cited by Dorsey, compels the conclusion that statements made to a sexual assault nurse examiner for both medical and legal purposes are testimonial. Because there could be fair-minded disagreement about whether such statements are testimonial, we cannot grant Dorsey habeas relief.

Id. at 267 (citing *White v. Woodall*, 572 U.S. 415, 427 (2014); *Tapke v. Brunsman*, 565 F. App'x 430, 436 (6th Cir. 2014)).

Upon review of the record, and in light of the holding in *Dorsey*, I find that the Ohio Court of Appeals' denial of Townsend's Ground Three Confrontation Clause claim based on the admission of the hearsay statements by Nurse Schreiber, was neither contrary to nor an unreasonable application of clearly established federal law. Accordingly, even if Townsend's

Ground Three claim were not procedurally defaulted, it would be due to be DENIED for lack of merit.

D. Ground Four – Judicial Bias

In his Ground Four claim, Townsend appears to assert a claim that his due process rights under the U.S. Constitution were violated because of judicial bias and abuse of discretion by the trial judge. ECF Doc. 59 at PageID # 799. In support, Townsend provided a portion of the trial transcript and a notice of a disciplinary complaint against the trial judge from January 2022. *Id.* at Page ID # 799-800. Initially, Warden Foley notes that Townsend presented this claim as his second assignment of error before the Ohio Court of Appeals on direct review. ECF Doc. 70 at PageID # 1023. He then argues that Townsend's Ground Four claim is meritless because the state court reasonably rejected Townsend's claims of judicial bias; the record does not reflect judicial bias; and this court should not disturb the state court's determination under AEDPA. *Id.* at PageID # 1023-25.

Townsend raised his Ground Four claim on direct appeal as his second assignment of error: "The trial court erred when it improperly convicted Defendant-Appellant when there was judicial bias against him."[18] ECF Doc. 70-1 at PageID # 1240-43. Townsend argued that he was subject to an unfair trial based on the trial court displaying apparent "frustration" and "displeasure" with Townsend in front of the jury (relating to certain questions and objections raised by Townsend), which "would have prejudiced the jury" and deprived him of a fair trial. *Id.* at PageID # 1059-60.

[18] The subheading for this assignment of error stated: "Second issue for review and argument: whether the level of bias exhibited by the trial court to defendant-appellant is cause for reversible error." ECF Doc. 70-1 at PageID # 1158.

"[D]ue process demands that [a trial] judge be unbiased." *Railey v. Webb*, 540 F.3d 393, 399 (6th Cir. 2008) (citing *In re Murchison*, 349 U.S. 133, 136 (1955)). To succeed on a judicial bias claim, the petitioner must point to evidence showing that the trial judge had a "predisposition . . . so extreme as to display clear inability to render fair judgment." *Liteky v. United States*, 510 U.S. 540, 551 (1994); *Lewis v. Robinson*, 67 F. App'x 914, 922 (6th Cir. 2003) (citing *Burton v. Jones*, 321 F.3d 569, 577 (6th Cir. 2003)). In overruling Townsend's judicial bias claim, the Ohio Court of Appeals stated:

> {¶ 29} In the second assignment of error, Townsend claims that his convictions should be vacated because the trial court was biased against him. Specifically, Townsend claims that the trial court sua sponte sustained objections to his questions and berated Townsend in the presence of the jury.
>
> {¶ 30} In *Litecky* [*sic*] *v. United States,* 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), the United States Supreme Court held that opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disproving [*sic*] of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. *Id.* Instead, one must examine whether the remarks reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. *Id.*
>
> {¶ 31} A review of the record shows that the questions the trial court did not allow or sua sponte sustained objections to were either inadmissible or inappropriate questions Townsend posed to witnesses. The court repeatedly warned Townsend that he could not make statements in front of the jury while questioning witnesses and repeatedly assisted Townsend in rephrasing questions or offered suggestions to assist him with presenting his case. Townsend chose to proceed pro se; before doing so, he acknowledged that he had been warned of the perils of proceeding pro se and dangers of self-representation.
>
> {¶ 32} The second assignment of error is without merit and is overruled.

ECF Doc. 70-1 at PageID # 1214-15.

Here, the Ohio Court of Appeals' denial of Townsend's claim of judicial bias, was neither contrary to, nor an unreasonable application of federal law, and it did not reflect an

unreasonable determination of the facts upon the record before the court. 28 U.S.C. § 2254(d)(1). The appellate court acknowledged and applied the correct Supreme Court standard under *Liteky v. United States*, reviewed the record and the alleged instances of bias, and reasonably determined that the trial court's actions not only did not rise to the level of a due process violation but were wholly appropriate given the nature of the questions Townsend posed during the trial:

As evidence to support his Ground Four claim, Townsend's amended petition only cited a single excerpt from the trial transcript and a January 2022 disciplinary complaint filed against the trial judge. ECF Doc. 59 at PageID # 799-800. First, Townsend has not argued or otherwise demonstrated that either of these facts would cause us to conclude that the Ohio Court of Appeals' decision violated the AEDPA standard in 28 U.S.C. § 2254(d)(1). Second, the disciplinary complaint that Townsend alluded to: (i) was not related to Townsend's trial and does not demonstrate that judicial bias occurred in Townsend's trial;[19] and (ii) was not part of the record evidence before the Ohio Court of Appeals. *See* ECF Doc. 59 at PageID # 799-800. Finally, the judge's statements in the portion of the trial transcript cited in the amended petition, *id.* at PageID # 799, do not demonstrate judicial bias on their face; and they could not have prejudiced Townsend in the eyes of the jury, because the statements were made during a hearing outside the presence of the jury, *see* ECF Doc. 71-1 at PageID # 1027-28, 1040-42. In sum, Townsend has not argued, nor does the record or his supporting facts demonstrate, that the Ohio Court of Appeals' decision to reject his judicial bias claim was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 102.

[19] The disciplinary action did not involve allegations of misconduct related to Townsend's trial. *See Disciplinary Couns. v. Gaul.*, 2023-Ohio-4751 (Ohio 2023).

I recommend that Townsend's Ground Four claim be DENIED as meritless.

E. Ground Five – Compulsory Process Violation

In his Ground Five claim, Townsend contends that he was denied his Sixth Amendment right to compulsory process, citing a portion of the trial transcript where the trial judge denied Townsend's request for a continuance after a defense witness was not in attendance. ECF Doc. 59 at PageID # 801-02. Warden Foley argues that this claim lacks merit because: (i) the Ohio Court of Appeals reasonably determined that Townsend had not shown his witnesses had been properly served with a subpoena and he failed to offer any proffer as to the necessity of the alleged witnesses; and (ii) Townsend cannot demonstrate that the state court's decision was an unreasonable application of federal law or was based on an unreasonable determination of the facts. ECF Doc. 70 at PageID # 1025-28.

Because the Ohio Court of Appeals adjudicated Townsend's claim that his right to compulsory process was violated, this court must give deference to that adjudication. 28 U.S.C. § 2254(d). Townsend raised his Ground Five claim on direct appeal to the Ohio Court of Appeals as his fourth assignment of error. ECF Doc. 70-1 at PageID # 1162. Townsend's state court appellate brief noted that he had raised concerns about a potential witness being unavailable. *Id.* (citing ECF Doc. 71-1 at PageID # 3589), but the trial judge essentially stated it was Townsend's "own problem" if witnesses didn't appear. *Id.* And Townsend cited the trial judge's unwillingness to "enforce subpoenas."[20] *Id.* Townsend argued that the court's failure to enforce the subpoena at issue mandated reversal because: (i) it was clear the subpoenas were

[20] Townsend's appellate brief did not cite the record on this point, but the trial judge did state: "I'm not here to enforce subpoenas or to deal with issues with witnesses. Part of being your own attorney is seeing to it that your witnesses come to court in a timely manner. The defendant has not accomplished this and that's on him, not me." ECF Doc. 71-1 at Page ID # 3601.

issued; (ii) the trial court demonstrated no interest in protecting Townsend's right to compulsory process; and (iii) the right to compulsory process is essential. *Id.*

In overruling Townsend's compulsory process assignment of error, the Ohio Court of Appeals stated:

> {¶ 37} In the fourth assignment of error, Townsend claims that his convictions should be reversed because the trial court failed to enforce a subpoena and thereby violated his right to compulsory process.
>
> {¶ 38} This court has held that a defendant is not denied compulsory process by reason of a trial court's decision not to enforce the subpoena of a witness. *In the Matter of Timothy Reynolds*, 8th Dist. Cuyahoga No. 46585, 1983 Ohio App. LEXIS 12312, 7 (Nov. 3, 1983). Pursuant to R.C. 2317.21, in order to obtain the issuance of a writ of attachment from the court and secure the attendance of an absent witness, it is necessary for the disobeying witness to have been personally served with a prior subpoena. *See State v. Hardy*, 8th Dist. Cuyahoga, No. 86722, 2007-Ohio-1159, ¶ 68-69, citing *State v. Wilcox*, 8th Dist. Cuyahoga Nos. 60851 and 60886, 1992 Ohio App. LEXIS 3043 (Jun. 11, 1992).
>
> {¶ 39} During trial, Townsend told the court who he wanted to testify on his behalf. Townsend never demonstrated that any of his purported witnesses were personally served with a subpoena.
>
> {¶ 40} This court has held that "[i]t is incumbent upon a party moving for a continuance to secure the attendance of witnesses to demonstrate that substantial favorable testimony will be forthcoming and that the witnesses are willing and available as well." *In the Matter of Timothy Reynolds* at *id.*, citing *United States v. Boyd*, 620 F.2d 129 (6th Cir. 1980); *see also State v. Makin*, 8th Dist. Cuyahoga No. 104545, 2017-Ohio-7882, ¶ 21. Here, in addition to failing to demonstrate personal service upon any witnesses, Townsend did not proffer the favorable testimony that he claims the absent witnesses would have given. Thus, Townsend cannot now argue that he suffered reversible prejudice.

Id. at PageID # 1217-18. The Ohio Supreme Court affirmed the Ohio Court of Appeals' decision.[21] *Id.* at PageID # 1314.

[21] Townsend raised the same compulsory process argument in his first Rule 26(B) application for reopening. ECF Doc. 70-1 at PageID # 1638. Once again, the Ohio Court of Appeals again rejected Townsend's claim, finding that Townsend failed to: (i) plausibly show that the desired witness's testimony was material and favorable to his defense; and (ii) "demonstrate how the testimony of any excluded witness would have resulted in a different outcome at trial." *Id.* at PageID # 1685-86.

The state court's factual findings are presumed correct, and Townsend has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Townsend did not rebut that presumption; he has not produced any evidence to demonstrate that he served the alleged witness with a subpoena or that he proffered potentially favorable testimony. Nor has he argued that the Ohio Court of Appeals' decision to deny his compulsory process claim misapplied Supreme Court caselaw or constituted an unreasonable determination of the facts.

The Ohio Court of Appeals applied the correct legal standard, noting that the defendant must show how the absent witness's testimony would have been favorable to the defense. The court cited an Ohio case which relied on the Sixth Circuit's decision in *United States v. Boyd,* 620 F.2d 129 (6th Cir. 1980). *Boyd* is consistent with the Supreme Court's holding in *United States v. Valenzela-Bernal*, 458 U.S. 858, 867 (1982) (holding that the defendant "must at least make some plausible showing of how [the witness's] testimony would have been both material and favorable to his defense"). And there is nothing to suggest that the Ohio Court of Appeals made any unreasonable determination of facts on the record before it. As he failed to do in the trial court and the Ohio Court of Appeals, Townsend has not demonstrated that his missing witness was ever properly served with a subpoena, and the entire record is devoid of any description of favorable testimony the missing witness might have been able to give. *See* ECF Doc. 71-1 at PageID # 1231-35. Without such evidence, Townsend cannot establish a violation of his Sixth Amendment right to compulsory process or demonstrate that the denial of a continuance resulted in a prejudicial error.

I recommend that Townsend's Ground Five claim be DENIED as meritless.

F. Ground Six – Sixth Amendment Right to Effective Counsel

In his Ground Six claim, Townsend asserts that he was denied his right to effective assistance of counsel when the trial court declined to appoint Ms. Glick as defense counsel. *See* ECF Doc. 59 at PageID # 803-04. Warden Foley argues that this claim is: (i) procedurally defaulted because it was never raised in state court; and (ii) meritless because Townsend waived the right to counsel, chose to represent himself, and there is no right to appointed counsel of one's choosing. ECF Doc. 70 at PageID # 1029.

1. Procedural Default

Townsend's Ground Six claim is procedurally defaulted because he did not raise this claim on direct appeal or in any other state court post-conviction proceeding. *See* ECF Doc. 70-1 at PageID # 1149-67, 1231-71, 1469-508, 1631-58. On direct appeal, Townsend raised claims concerning whether his waiver of counsel was effective and if his right to self-representation was violated. *Id.* at PageID # 1157-58, 1161. But those claims are unrelated to whether the trial court violated Townsend's Constitutional rights by not appointing Ms. Glick as counsel. And Townsend's various claims regarding the effectiveness of his counsel and his waiver of counsel did not fairly present what he now asserts in his Ground Six claim. *See* ECF Doc. 70-1 at 1149-67, 1231-71; *see, e.g.*, *McMeans*, 228 F.3d at 681 (both the facts and legal theories underlying a federal constitutional claim must be presented at each stage to the state courts to satisfy the fair presentation requirement). Townsend has made no cause and prejudice argument to try to excuse his procedural default, and nothing in the record "demonstrate[s] that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

I recommend that Townsend's Ground Six claim be DISMISSED as procedurally defaulted.

2. Alternative Merits Analysis

Even if Townsend's Ground Six claim were not procedurally defaulted, it would fail for lack of merit. The Sixth Amendment right to counsel does not afford an absolute right to be represented by an indigent defendant's attorney of choice. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006) (reaffirming that "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them"); *see also United States v. Iles*, 906 F.2d 1122, 1130 (6th Cir. 1990) ("An indigent defendant has no right to have a particular attorney represent him and therefore must demonstrate "good cause" to warrant substitution of counsel.). Further, the right to choose counsel does not include the right for a defendant to "insist on representation by an attorney whom they cannot afford or who for other reasons declines to represent them." *Wheat v. United States*, 486 U.S. 153, 159 (1988).

To support his Ground Six claim, Townsend cited the portion of the trial transcript where the trial court appointed Mr. Smotzer as standby defense counsel, Townsend objected, and then he requested that Ms. Glick be appointed instead. ECF Doc. 59 at PageID # 803-04 (citing ECF Doc. 71-1 at PageID # 2386-88). The record reveals that this request was made during a hearing in which: (i) Townsend signed a waiver of right to counsel and an expression of intent to proceed *pro se* pursuant to Crim. R. 44, ECF Doc. 71-1 at PageID # 2363-91; and (ii) the court notified Townsend that Mr. Smotzer would serve as his standby counsel going forward, *id.* at PageID # 2371, 2376, 2386, 2392. Earlier in that hearing, Townsend stated that he had attempted to contact Ms. Glick and Ms. Cofta for representation but indicated that he had not received any indication either attorney would agree to represent him. *Id.* at PageID # 2365-68. The trial court

denied Townsend's request to appoint Ms. Glick because, in part, he would not appoint an attorney who had not responded to Townsend's request or otherwise indicated a desire to represent him. *Id.* at PageID # 2387.

Regardless, Townsend had no absolute right to appointed standby counsel of choice. *See Gonzalez-Lopez*, 548 U.S. at 151; *Wheat*, 486 U.S. at 159. Moreover, just as he failed to do in the trial court, Townsend has not shown: (i) the requisite good cause required to justify the replacement of his appointed standby counsel; or (ii) that the failure to appoint Attorney Glick was prejudicial. Further, Townsend's entire Ground Six claim is undermined by the fact that he *waived* his Sixth Amendment right to counsel, and that waiver was both upheld by the Ohio Court of Appeals, ECF Doc. 70-1 at PageID # 1210-14, and not offered as a federal habeas claim.

Thus, even if it were not procedurally defaulted, Townsend's Ground Six would fail on the merits.

IV. Certificate of Appealability

In light of the requirement that the Court either grant or deny a certificate of appealability at the time of its adverse ruling on a habeas petition, I make the following additional recommendation. Rule 11(a), 28 U.S.C. foll. § 2254.

Under 28 U.S.C. § 2253(c)(1)(A), this court will grant a certificate of appealability ("COA") for an issue raised in a §2254 habeas petition only if the petitioner has made a substantial showing of the denial of a federal constitutional right. *Cunningham v. Shoop*, 817 F. App'x 223, 224 (6th Cir. 2020). A petitioner satisfies this standard by demonstrating that reasonable jurists "could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to

proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (internal quotation marks omitted); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a claim is denied on procedural grounds, the petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

If the court accepts my recommendations, Townsend will not be able to show that the court's rulings on his claims are debatable among jurists of reason. Townsend's Ground One, Ground Two, Ground Three, and Ground Six claims are all procedurally defaulted, in addition to being alternatively noncognizable or meritless. His Ground Four and Ground Five claims are meritless. Because jurists of reason would not find these conclusions to be debatable, I recommend that no COA issue in this case.

V. Recommendation

I recommend that Townsend's petition for writ of habeas corpus under 28 U.S.C. § 2254 be DENIED and that his claims be resolved in the following manner: (i) Ground One be DISMISSED as procedurally defaulted or as noncognizable; (ii) Ground Two be DISMISSED as procedurally defaulted or DENIED as meritless; (iii) Ground Three be DISMISSED as procedurally defaulted or DENIED as meritless; (iv) Ground Four be DENIED as meritless; (v) Ground Five be DENIED as meritless; and (vi) Ground Six be DISMISSED as procedurally defaulted or DENIED as meritless. I further recommend that Townsend not be granted a COA

Dated: March 8, 2024

Thomas M. Parker
United States Magistrate Judge

Objections, Review, and Appeal

Within 14 days after being served with a copy of this report & recommendation, a party may serve and file specific written objections to the proposed findings and recommendations of the magistrate judge. Fed. R. Civ. P. 72(b)(2); *see also* 28 U.S.C.§ 636(b)(1); Local Rule 72.3(b). Properly asserted objections shall be reviewed de novo by the assigned district judge.

* * *

Failure to file objections within the specified time may result in the forfeiture or waiver of the right to raise the issue on appeal either to the district judge or in a subsequent appeal to the United States Court of Appeals, depending on how or whether the party responds to the report and recommendation. *Berkshire v. Dahl*, 928 F.3d 520, 530 (6th Cir. 2019). Objections must be specific and not merely indicate a general objection to the entirety of the report and recommendation; "a general objection has the same effect as would a failure to object." *Howard v. Sec'y of Health and Hum. Servs.*, 932 F.2d 505, 509 (6th Cir. 1991). Objections should focus on specific concerns and not merely restate the arguments in briefs submitted to the magistrate judge. "A reexamination of the exact same argument that was presented to the Magistrate Judge without specific objections 'wastes judicial resources rather than saving them, and runs contrary to the purpose of the Magistrates Act.'" *Overholt v. Green*, No. 1:17-CV-00186, 2018 U.S. Dist. LEXIS 100383, *6 (W.D. Ky. June 15, 2018) (quoting *Howard*). The failure to assert specific objections may in rare cases be excused in the interest of justice. *See United States v. Wandahsega*, 924 F.3d 868, 878-79 (6th Cir. 2019).

EXHIBIT (D)
APPENDIX

PEARSON, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ALBERT TOWNSEND,	)	
	)	CASE NO. 1:21-CV
Petitioner,	)	
	)	
v.	)	JUDGE BENITA Y. PEARSON
	)	
KEITH FOLEY,	)	
	)	
Respondent.	)	**MEMORANDUM OF OPINION & ORDER**
	)	[Resolving ECF Nos. 84, 85]
	)	

Pending before the Court are Petitioner Albert J. Townsend's Motion for Reconsideration (ECF No. 84) and Motion for Relief from Judgment (ECF No. 85). For the following reasons, Petitioner's motions are denied.

I. Background[1]

On March 8, 2024, the magistrate judge filed a Report and Recommendation (R&R) recommending that the petition for writ of habeas corpus be denied. ECF No. 74. The R&R recommended that: (1) Ground One be dismissed as procedurally defaulted or noncognizable; (2) Ground Two be dismissed as procedurally defaulted or denied as meritless; (3) Ground Three be dismissed as procedurally defaulted or denied as meritless; (4) Ground Four be denied as meritless; (5) Ground Five be denied as meritless; and (6) Ground Six be dismissed as procedurally defaulted or denied as meritless. ECF No. 74 at PageID #: 3858. The parties were

[1] The Court incorporates by reference the background and history described by the magistrate judge in his Report and Recommendation (ECF No. 74), which was adopted by the Court in its Memorandum of Opinion and Order (ECF No. 80).

ordered to file objections on or before March 22, 2024. *See* ECF No. 74 at PageID #: 3859 (giving the parties 14 days to file objections to the R&R). On March 18, 2024, Petitioner filed the first of three motions for extension of time to object to the R&R.[2] ECF No. 76. The Court granted this motion and Petitioner was ordered to file a single filing of objections on or before May 3, 2024. ECF No. 79.[3] On May 13, 2024, the Court issued a Memorandum of Opinion and Order adopting the magistrate judge's R&R. *See* ECF No. 80.

On May 14, 2024, the Court received Petitioner's Objection to the R&R. ECF No. 82. With the Objection, Petitioner attached a sworn affidavit, dated May 2, 2024, indicating that he mailed his Objection on April 29, 2024. ECF No. 82-11. The envelope containing Petitioner's Objection and attachments is dated May 7, 2024. ECF No. 82-12. On May 15, 2024, the Court received a Declaration by Petitioner stating he had mailed his Objection on May 3, 2024, but later realized that the mailroom did not process his mail that day. He asserts that the mailroom stated that "their Browse Machine was not working but they claimed to have mailed the documents on May 6, 2024 . . . the[n] they sa[id] they mailed the documents on May 7, 2024. . ." ECF No. 83 at PageID #: 3977.

Petitioner then filed the instant motion for reconsideration (ECF No. 84) and motion for relief from judgment (ECF No. 85).[4] Respondent has not responded to either motion. As a basis for both, Petitioner asserts that he timely submitted his Objection pursuant to the prisoner

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[2] The Court received ECF No. 76 on March 20, 2024, but pursuant to the inmate mailbox rule, Petitioner's motion is deemed filed on the date that Petitioner handed the motion to prison authorities for mailing. *See Houston v. Lack*, 487 U.S. 266 (1988) (establishing the prisoner mailbox rule for federal habeas corpus petitions).

[3] The other two motions for extensions of time, (ECF Nos 77 and 78), were denied as moot.

[4] Petitioner also filed a Notice of Appeal (ECF No. 86).

mailbox rule, and the Court failed to receive them because of problems in the mailroom. *See* ECF No. 84 at PageID #: 3982; ECF No. 85 at PageID #: 3987. Because Petitioner relies on the same argument for both motions, the Court considers them together.

II. Standard

A. Motion for Reconsideration

The Federal Rules of Civil Procedure do not provide for a "motion for reconsideration." Generally, when a party files a "motion to reconsider" a final order or judgment within 28 days of its entry, the motion is to be construed as a motion to alter or amend judgment pursuant to Rule 59(e). *See, e.g.*, *Inge v. Rock Financial Corp.*, 281 F.3d 613, 617 (6th Cir. 2002).

A motion to alter or amend judgment may be granted for any of the following three reasons: (1) to correct a clear error of law; (2) to account for newly discovered evidence or a change in controlling law; or (3) to otherwise prevent manifest injustice. *GenCorp, Inc. v. American Intern. Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999).

B. Motion for Relief from Judgment

A motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) may be granted for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or;
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

III. Discussion

As stated above, Petitioner filed the motion for reconsideration arguing that he timely filed his Objection to the R&R, and the delay in the Court's receipt was due to malfunctions with the prison mailroom. Petitioner submits a "Cash Slip" dated May 3, 2024, which supports his claim that he timely filed his Objection to the R&R. ECF No. 84-2. Without certainty of the date of Petitioner's filing, the Court will consider his objection to the R&R.

Petitioner does not list his objections to the report and recommendation (ECF No. 84). But he seems, however, to object to the magistrate judge's R&R for the following reasons: (1) "the Magistrate Judge erred in finding that Petitioner's grounds for relief are procedurally defaulted," ECF No. 82 at PageID #: 3881; and (2) "Petitioner raised more than six grounds for relief in his Amended Traverse," ECF No. 82 at PageID #: 3897.

A. Petitioner's "Objection"

1. Request for Full De Novo Review of Entire Case and Procedural Default

Petitioner begins his brief in support of his Objection by requesting "a full de novo review of [the] entire case." ECF No. 82 at PageID # 3880. Petitioner then argues that "the magistrate judge erred in finding that Petitioner's grounds for relief are procedurally defaulted." ECF No. 82 at PageID #: 3882. Petitioner does not address why the magistrate judge was incorrect in finding that his grounds for relief were procedurally defaulted. Instead, Petitioner attempts to reargue each of his claims and the factual background of the case. ECF No. 82 at PageID #: 3883–3891.

When a petitioner makes an objection to a magistrate judge's Report and Recommendation, the district court's standard of review is *de novo*. Fed. R. Civ. P. 72(b)(3). A district judge:

> must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

Id. Importantly, objections "must be specific in order to trigger the de novo review." *Bulls v. Potter*, No. 5:16-CV-02095, 2020 WL 870931, at *1 (N.D. Ohio Feb. 21, 2020) (citing Fed. R. Civ. P. 72(b)(2)). "An 'objection' that does nothing more than state a disagreement with a magistrate [judge]'s suggested resolution, or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context." *Spring v. Harris*, No. 4:18-CV-2920, 2022 WL 854795, at *4 (N.D. Ohio Mar. 23, 2022) (quoting *Aldrich v. Bock*, 327 F. Supp. 2d 743, 747 (N.D. Ohio 2022)). "A party disappointed with the magistrate judge's recommendation has a 'duty to pinpoint those portions of the magistrate's report that the district court must specially consider.'" *Id.* (quoting *Enyart v. Coleman*, 29 F. Supp. 3d 1059, 1068 (N.D. Ohio 2014)). "A general objection to the entirety of [a Report and Recommendation]" or "an exact recitation of arguments previously raised" will fail to "meet the specificity requirement for objections." *Potter*, 2020 WL at *1.

The Court's role is not to conduct a "*de novo* review of the entire case," but instead to conduct a *de novo* review of Petitioner's *specific* objections to the magistrate judge's report and recommendation. Petitioner's general objection that his grounds for relief are not procedurally defaulted is not sufficiently specific to warrant a judicial response. Additionally, Petitioner voices his disagreement with the magistrate judge's conclusion, by presenting information already submitted and considered. Therefore, the Court overrules this "objection" to the R&R.

2. Grounds for Relief

As stated above, Petitioner also objects to the magistrate judge's R&R by arguing that he raised more than six grounds of relief in his Amended Traverse, and the magistrate judge addressed only six. Petitioner's argument misconstrues the docket.

In January 2022, Petitioner filed a "Traverse." ECF No. 7. No return of writ had been filed. Three days later, Petitioner filed a "Motion to Amend Traverse." ECF No. 9. Respondent still had not filed a return of writ. The magistrate judge found "that neither [Petitioner's traverse nor discovery] amendment [was] necessary for the Court's understanding of the case or the propriety of the filings." Order [non-document], 01/27/2022. Accordingly, the magistrate judge denied Petitioner's motion to "amend traverse." Order [non-document], 01/27/2022. Nonetheless, Petitioner attempted to file an "Amended Traverse" that was returned to him with the judge's January 27, 2022 Order on his motion to amend. In June 2023, Respondent filed a Return of Writ (ECF No. 70). Petitioner did not file a Traverse. To cure this deficiency, in August 2023, the magistrate judge ordered Petitioner to file a traverse by September 15, 2023. ECF No. 73. Petitioner failed to do so.[5]

There is no "Amended Traverse" on the docket, and no other document on the docket indicates what his "sixteen propositions of law" are.[6] Therefore, Petitioner's "additional sixteen propositions of law" presented to the magistrate judge, were determined not to be "necessary for

[5] Petitioner did not file anything from July 2023 until March 2024 when he filed his motion for extension of time to object to the R&R.

[6] Petitioner directs the Court to "pages 1-6, with supporting Case Laws Page i and Statutes and Authorities Page ii." ECF No. 82 at PageID #: 3897. The docket reflects no responsive filing.

the Court's understanding of the case or the propriety of the filings," and returned to him.[7] Order [non-document], 01/27/2022 (rejecting amended traverse). Therefore, the Court overrules this "objection" to the R&R.

IV. Conclusion

For the reasons given above, even if the Court had timely received Petitioner's Objection, the Court finds that his objections are meritless, overrules them, and adopts the magistrate judge's Report and Recommendation (ECF No. 74). Having overruled both of Petitioner's "objections" to the R&R, the Court finds that Petitioner has failed to establish any reason to grant his motion for reconsideration. Therefore, Petitioner's motion for reconsideration (ECF No. 84) is denied. The Court also finds that Petitioner has failed to establish any reason to grant his motion for relief from judgment. Therefore, Petitioner's motion for relief from judgment (ECF No. 85) is also denied.

The Clerk of this Court shall inform the Clerk of the United States Court of Appeals for the Sixth Circuit of the within determination.[8]

IT IS SO ORDERED.

July 25, 2024
Date

/s/ Benita Y. Pearson
Benita Y. Pearson
United States District Judge

[7] In other words, the filing was out of sequence—there was no writ to which it was responsive.

[8] An appeal to the Sixth Circuit, Case No. 24-3536, has been held in abeyance until the within Order disposing of the post-judgment motion is filed and jurisdiction has transferred to the Court of Appeals. *See* Appeal Remark (ECF No. 87)

No. 24-3536

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALBERT J. TOWNSEND,

Petitioner-Appellant,

v.

KEITH J. FOLEY, Warden,

Respondent-Appellee.

ORDER

Before: NORRIS, MOORE, and READLER, Circuit Judges.

Albert J. Townsend, a pro se Ohio prisoner, petitions for rehearing of this court's December 6, 2024, order denying his motion for a certificate of appealability. We have reviewed the petition and conclude that the court did not overlook or misapprehend any point of law or fact in denying Townsend's motion for a certificate of appealability. *See* Fed. R. App. P. 40(b)(1)(A).

Accordingly, the petition for rehearing is **DENIED**.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 02/05/2025.

Case Name: Albert Townsend v. Keith Foley
Case Number: 24-3536

Docket Text:
ORDER filed denying petition for panel rehearing [7280379-2] filed by Mr. Albert J. Townsend. Alan E. Norris, Circuit Judge; Karen Nelson Moore, Circuit Judge and Chad A. Readler, Circuit Judge.

The following documents(s) are associated with this transaction:
Document Description: Order

Notice will be sent to:

Mr. Albert J. Townsend
Grafton Correctional Institution
2500 S. Avon Belden Road
Grafton, OH 44044

A copy of this notice will be issued to:

Ms. Sandy Opacich
Ms. Stephanie Lynn Watson

Additional material from this filing is available in the Clerk's Office.